TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 20

WILLIAM F. ESENWEIN, PETITIONER,

vs.

COMMONWEALTH EX REL. MAY H. ESENWEIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED FEBRUARY 3, 1944.

CERTIORARI GRANTED JUNE 12, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

WILLIAM F. ESENWEIN, PETITIONER,

vs.

COMMONWEALTH OF PENNSYLVANIA, EX REL. MAY H. ESENWEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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[fol. 1]

IN COUNTY COURT OF ALLEGHENY COUNTY

DOCKET ENTRIES

Charge: Desertion and Non Support.

March 13, 1922, Information made on oath of May H. Esenwein, wife of defendant. Hearing fixed for March 20, 1922.

Eo die, Probation Officer's notice to defendant to appear exit.

March 20, 1922, after hearing, formal order made requiring defendant to pay wife $150.00 per month. Pay $25.00 cash. Order to start April 1, 1922. Defendant to enter own recognizance in the sum of $1000.00 to comply.

Oct. 3, 1922, rule granted on prosecutrix to show cause why order should not be vacated or decreased; returnable Oct. 10, 1922.

Oct. 10, 1922, order modified and formal order made requiring defendant to pay wife $20.00 per week and enter own recognizance in the sum of $1000.00.

Jan. 29, 1923, rule granted on prosecutrix to show cause why order should not be reduced or vacated; returnable Feb. 6, 1923.

Feb. 6, 1923, after hearing, rule discharged. County pay costs.

July 29, 1924, Petition for re-hearing filed by prosecutrix.

Sept. 4, 1924, answer to petition filed.

[fol. 2] Sept. 9, 1924, order modified, formal order made requiring defendant to pay wife $100.00 per month and $50.00 per month extra during the months of July and August. Defendant to enter his own recognizance in the sum of $1000.00.

Jan. 11, 1927, rule granted on defendant to show cause why re-hearing should not be granted; returnable Jan. 20, 1927.

Jan. 18, 1927, answer filed.

Jan. 20, 1927, order modified and formal order made requiring defendant to pay wife $160.00 per month and enter own recognizance in the sum of $2000.00.

March 22, 1928, Petition presented in Open Court and rule granted on defendant to show cause why he should not be attached; returnable March 26, 1928.

Eo die, Service of rule accepted by Addison Lyon, attorney for defendant.

March 26, 1928, on trial list and case continued.

Nov. 24, 1931, rule granted on defendant to show cause why he should not be attached; returnable Dec. 14, 1931.

Dec. 14, 1931, parties not appearing, rule discharged. County pay costs.

Feb. 16, 1932, rule granted on prosecutrix to show cause why order should not be vacated; returnable March 1, 1932. Certified copy of divorce decree filed.

[fol. 3] Feb. 25, 1932, rule granted on defendant to show cause why he should not be attached; returnable March 1, 1932.

And now March 9, 1932, the within rule to vacate order discharged. Opinion filed.

Eo die, on rule to show cause, rule absolute and attachment in contempt directed to issue. Opinion filed.

Nov. 25, 1933, rule granted on prosecutrix to show cause why order should not be vacated or reduced; returnable Dec. 7, 1933.

Dec. 7, 1933, after hearing, rule discharged. County pay costs.

March 1, 1934, rule granted on prosecutrix to show cause why order should not be reduced; returnable March 8, 1934.

March 8, 1934, after hearing, order modified, requiring defendant to pay $130.00 per month. Recognizance heretofore entered to remain in force. County pay costs.

March 8, 1939, rule granted upon defendant to show cause why order for support should not be increased; returnable March 22, 1939.

March 31, 1939, modified order made requiring defendant to pay $150.00 per month for a period of four months (July 31, 1939) at which time the order for support shall automatically revert to $130.00 per month. Recognizance [fol. 4] heretofore entered to remain in force. Defendant to pay costs $6.25 (McKim, P. J.).

Jan. 20, 1940, the foregoing petition presented in open Court and upon consideration thereof and on motion of Fred C. Houston, attorney for the petitioner, a rule is granted on

the said May H. Esenwein, respondent to show cause why the order for support entered on March 8, 1939 should not be vacated and the records of this case marked closed. Returnable Jan. 29, 1940 at 9:30 o'clock A. M.

Feb. 1, 1940, answer of May H. Esenwein to petition to vacate order and rule to show cause filed.

Feb. 1, 1940, continued to Feb. 6, 1940.

Feb. 6, 1940, on trial list and continued to Feb. 20, 1940.

Feb. 20, 1940, on trial list and continued.

Sept. 24, 1940, rule granted on defendant to show cause why order for support should not be increased; returnable Oct. 1, 1940.

Sept. 30, 1940, continued to Oct. 9, 1940.

Oct. 9, 1940, on trial list and continued.

Oct. 11, 1940, rule granted on prosecutrix to show cause the order should not be reduced; returnable Oct. 15, 1940 at 2:00 P. M.

Jan. 6, 1941, order modified requiring defendant to pay $150.00 per month. Recognizance heretofore entered to remain in force. County pay costs. To which order de-[fol. 5] fendant's counsel, Fred C. Houston, excepts. Exception noted and bill sealed (McKim, P. J.).

July 29, 1941, on Order of Court (McKim, P. J.) leave granted Alter, Wright and Barron and James G. Fulton to withdraw their appearance as counsel for May H. Esenwein, prosecutrix.

Oct. 22, 1941, rule granted upon defendant to show cause why he should not be attached; returnable Nov. 12, 1941.

Nov. 12, 1941, on trial list, case continued to Nov. 19, 1941.

Nov. 19, 1941, on trial list and continued to Nov. 25, 1941.

Nov. 25, 1941, on trial list, case called and parties not appearing, rule discharged. County pay costs (Lencher, J.)

Feb. 16, 1942, rule granted on defendant to show cause why he should not be attached; returnable March 4, 1942.

March 4, 1942, on trial list, case continued to March 11, 1942.

March 11, 1942, on trial list and case called, defendant's whereabouts unknown, rule continued indefinitely. County pay costs.

April 7, 1942, on petition, rule granted upon defendant to show cause why arrearages in the sum of $675.00 should not [fol. 6] be reduced to a judgment; returnable April 22, 1942 (McKim, P. J.).

April 22, 1942, on trial list, case called and parties not appearing, rule discharged. County pay costs (McKim, P. J.).

July 22, 1942, on petition, rule granted upon prosecutrix to show cause why order should not be reduced; returnable Sept. 30, 1942, and commission issued to Roy C. Green, Esq., of Cleveland, Ohio to take oral testimony of Wm. F. Esenwein.

Ex die, commission exit (Pd. $1.75) McKim, P. J.

Sept. 22, 1942, rule granted on defendant to show cause why he should not be attached; returnable Sept. 30, 1942.

Sept. 29, 1942, at request of Attorney Fred C. Houston, Esq., for petitioner, Return Day is extended to Nov. 10, 1942 (McKim, P. J.).

Nov. 4, 1942, order extending Return Day filed; returnable Dec. 8, 1942 (McKim, P. J.).

Nov. 28, 1942, Commission and Interrogatories returned by Commissioner and filed. Commissioner's fee not stated. Counsel notified.

Dec. 8, 1942, and now to-wit, after the offer of depositions by the defendant and no further testimony offered by prosecutrix, the Court under its discretion reduces the arrearages from $1625.00 to $1000.00 and makes an order as of this date that the defendant pay prosecutrix $75.00 [fol. 7] a month. The $1000.00 to be paid in one payment on or before the 15th day of December; this payment is in lieu of all arrearages up to the date of this Order. County pay costs. (By the Court, McKim, P. J.).

Jan. 27, 1943, rule granted on defendant to show cause why he should not be attached; returnable Feb. 10, 1943.

Feb. 1, 1943, petition presented in open Court upon prosecutrix to show cause why order of Court should not be revocated; returnable Feb. 11, 1943.

Feb. 8, 1943, defendant's answer to rule filed.

Feb. 10, 1943, on trial list and continued to Feb. 18, 1943.

Feb. 17, 1943, answer to petition for revocation of support order and acceptance of service filed.

Feb. 18, 1943, on trial list and continued to Feb. 26, 1943.

Feb. 26, 1943, petition for amendment of petition for revocation of order for support and for other relief filed.

Feb. 26, 1943, the above entitled case came on for hearing on the petition for the revocation of the Order for support (as amended) and on the rule on defendant to show cause why he should not be attached for failure to comply with the Order for support, and after hearing, it is ordered that the original petition for the revocation of the Order for [fol. 8] support (and as amended) is refused and the rule on defendant to show cause why he should not be attached for failure to comply with the order for support is made absolute. County pay costs (Gunther, J.).

March 5, 1943, Certiorari to Superior Court filed by defendant at 233 April Term, 1943, returnable the 3rd Monday of April, 1943 from order of date Dec. 8, 1942.

March 5, 1943, Certiorari to Superior Court filed by defendant at #234 April Term, 1943, returnable the 3rd Monday of April, 1943 from the order entered under date of Feb. 26, 1943 refusing defendant's prayer for the opening of the Order of Dec. 8, 1942.

March 5, 1943, Certiorari to Superior Court filed by the defendant at #235 April Term, 1943, returnable the 3rd Monday of April, 1943 from the order of Feb. 26, 1943 refusing defendant's prayer for the vacation of the order of Dec. 8, 1942 and making absolute rule of prosecutrix for attachment.

March 8, 1943, transcript of testimony filed showing stenographic fee of C. E. Urban in the sum of $7.60 chargeable to Allegheny County.

March 26, 1943, Opinion filed.

Certified from the Record.

Wm. H. Frasher, Clerk of County Court. (Seal.)

[fol. 9] In County Court of Allegheny County

Petition for Reduction—Filed Nov. 12, 1942

To the Honorable, The Judges of said Court:

The petition of William F. Esenwein respectfully shows:

First. That on January 26, 1941, your petitioner, at the above number, was ordered to pay to May H. Esenwein, the prosecutrix, the sum of One Hundred Fifty ($150.00) Dollars per month.

Second. That during the month of June, 1941, petitioner sold his interest in his business in the City of Pittsburgh, Allegheny County, Pennsylvania, and since that time has been unemployed.

Third. That on or about June 30, 1941, petitioner became the resident of the State of Nevada, residing in the City of Las Vegas in said State.

Fourth: That on or about August 5, 1941 your petitioner filed a suit in divorce against the said May H. Esenwein in the Eighth Judicial Court of the State of Nevada.

Fifth. That May H. Esenwein, the defendant in said action, was served personally with the summons issued by said court, but failed to appear, plead or answer said suit within the time provided by law.

Sixth. That on September 8, 1941, the said court entered a decree in divorce which read in part as follows:

[fol. 10] "It is ordered, adjudged, and decreed, that the bonds of matrimony now and heretofore existing between the plaintiff, William F. Esenwein, and the defendant, May H. Esenwein, be, and the same are hereby wholly dissolved and a decree of absolute divorce is hereby granted plaintiff and each of the parties hereto are hereby restored to the status of single persons."

Seventh. That on or about October 18, 1941, petitioner became a resident of the State of Ohio and at the present time resides in the City of Cleveland in said State.

Eight. That petitioner's sole income since June, 1941 has been from his investments and for the first six months of 1942 amounted to $1,788.09.

Ninth. That the present order entered by your Honorable Court on January 26, 1941 is greatly in excess of one-third of petitioner's income and should be reduced *nunc pro tunc* as of January 1, 1942.

Tenth. That at the present time there are arrearages of approximately $800.00.

Wherefore, petitioner prays as follows:

A. That the arrearages which have accrued under the order of January 26, 1941 be remitted.

B. That the present order for support to the said May H. Esenwein be reduced to such amount as your Honorable Court may deem meet and proper.

[fol. 11] C. That a commission issue to Roy C. Green, Esq., of Cleveland, Ohio, authorizing him to take the deposition of your petitioner on oral examination.

And petitioner will ever pray, etc.

William F. Esenwein.

Duly sworn to by William F. Esenwein. Jurat omitted in printing.

In County Court of Allegheny County

Order Granting Rule

And now, July 22nd, 1942, the foregoing petition having been presented in open court, upon consideration thereof a rule is granted on the said May H. Esenwein to show cause why the prayer of the petitioner should not be granted, returnable the 30th day of Sept., 1942, service to be made on the prosecutrix either personally or by registered mail [fol. 12] directed to her last known address.

It is further ordered that a commission issue to Roy C. Green, Esq., of Cleveland Ohio, authorizing him to take the deposition of William F. Esenwein, the petitioner, on oral examination.

By the Court, McKim, P. J.

IN THE COUNTY COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 287—1922

COMMONWEALTH *ex rel.* MAY H. ESENWEIN

vs.

WILLIAM F. ESENWEIN

(Desertion and Non-support)

Hearing of December 8, 1942

Before Hon. Samuel J. McKim, P. J.

Tuesday, December 8, 1942—3:30 P. M.

Counsel Present:

N. J. Lippard, Esq., for Prosecutrix,

Fred C. Houston, Esq., for Defendant

Hearing on Prosecutrix' petition for arrearages, and also Defendant's petition for a reduction. Prosecutrix present together with counsel; Defendant not appearing but represented by Counsel.

[Tol. 13] *Mr. Houston:*

Counsel for William F. Esenwein offers in evidence the written deposition of respondent, which was taken in an oral examination on November 19, 1942, at Room 1857, Union Commerce Building, Cleveland, Ohio, at which hearing both parties were represented by Counsel. This deposition is offered in support of the petition of William F. Esenwein, the respondent, in which he asks for a reduction in the Order and remission of arrearages.

Mr. Lippard:

No objection to the offer being made, but with one addition. Counsel for the prosecutrix assuming that the testimony given by the defendant at Cleveland is correct. If, however, it is found that the income is far greater than is enumerated in the testimony, plaintiff may again be heard in the matter.

IN COUNTY COURT ALLEGHENY COUNTY

ORDER REDUCING ARREARAGES, ETC.

And now, to-wit December 8th, 1942, after the offer of depositions by the defendant, and no further testimony offered by prosecutrix, the Court under its discretion reduces the arrearages from $1625.00 to $1000.00, and makes an Order as of this date that the defendant pay prosecutrix $75.00 a month. The $1,000.00 to be paid in one payment on or before the 15th of December; this payment is in lieu of all arrearages, up to the date of this Order. County to pay costs.

By the Court, McKinn, P. J.

[fol. 14] IN COUNTY COURT OF ALLEGHENY COUNTY

PETITION FOR ATTACHMENT—Filed January 27, 1943

To the Honorable, the Judges of said Court;

The petition of May H. Esenwein respectfully shows

That on the Mod: 8th day of December, 1942, the above-named defendant at above number, was ordered to pay your petitioner the sum of Seventy-five Dollars per month, with which order he has failed to comply, so that now he is in arrears to the extent of One hundred twelve and 50/100 ($112.50) Dollars due January 23rd, 1943.

Whereupon your petitioner prays that the said defendant may be adjudged in contempt, and that an attachment may issue and that he be arrested and committed until he shall have purged himself of said contempt by the payment of all arrears, and compliance with such further conditions as the Court may impose.

And petitioner will ever pray, etc.

May H. Esenwein.

Duly sworn to by May H. Esenwein. Jurat omitted in printing.

[fol. 15] In County Court of Allegheny County

Order Granting Rule

And now, to-wit, Jan. 27, 1943, a rule is granted upon said defendant to show cause why he should not be attached for contempt in failing to comply with terms of the order of the Court at above number.

Returnable the 10th day of Feb., 1943, at 9:30 o'clock A. M.

Lencher, J.

In County Court of Allegheny County

Petition for Revocation of Order of Support—Filed Feb. 1, 1943.

To the Honorable, the Judges of Said Court:

The petition of William F. Esenwein respectfully represents:

First. This proceeding was commenced by the above named prosecutrix to compel petitioner as her husband to contribute to her support. As the clerk's docket entries show, the order as originally entered has been frequently modified. The most recent order was entered under date of December 8, 1942, whereby arrearages in payment were reduced to One Thousand Dollars ($1,000.00) and the monthly rate reduced to Seventy-Five Dollars ($75.00). Petitioner has paid the said sum of One Thousand Dollars ($1,000.00).

Second. Shortly after the entry of said order of December 8, 1942, the Supreme Court of the United States handed down its decision in the case of *Williams and Hendrix*, petitioners, vs. *The State of North Carolina*, No. 29 October [fol. 16] Term 1942. Said decision was filed on December 21, 1942, and in and by the same the former decision of said Court as rendered in *Haddock vs. Haddock*, 201 U. S. 562 was overruled.

Third. Petitioner now avers that he was divorced from the prosecutrix by a decree entered on September 8, 1941 by the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. In and by said decree it

was ordered that the bonds of matrimony theretofore existing between the petitioner and the prosecutrix should be and the same were wholly dissolved and each of said parties restored to the status of single persons. The said decree of divorce is by virtue of the aforesaid decision of the Supreme Court of the United States, filed December 21, 1942, entitled to full faith and credit in this Court.

Fourth. An exemplification of the record of said divorce proceeding in said Nevada Court, duly certified pursuant to the provisions of the Act of Congress relating thereto, is hereto attached, made part hereof and marked Exhibit A.

Fifth. Petitioner is no longer the husband of the prosecutrix and has not been such since September 8, 1941, when the duty to pay support to prosecutrix ceased.

Wherefore, petitioner prays that the aforesaid order of support as entered herein under date of December 8, 1942 be vacated and that this proceeding be dismissed.

William F. Esenwein.

[fol. 17] *Duly sworn to by William F. Esenwein. Jurat omitted in printing.*

[fol. 18] EXHIBIT "A" TO PETITION FOR REVOCATION OF ORDER OF SUPPORT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Aug. 5, 1941. Lloyd S. Payne, Clerk, by Jean Purdue Deputy

COMPLAINT

Plaintiff complains of the defendant and for cause of action alleges:

I

That the plaintiff is now, and for more than six weeks last past; immediately preceding the filing of this action,

has been a bona fide resident of the County of Clark, State of Nevada, and has continuously resided and been physically present and domiciled during all of said period in said County of Clark.

II

That the plaintiff and defendant intermarried at the City of Pittsburgh, State of Pennsylvania, on or about the 22nd day of November, 1899, and they ever since have been, and still are husband and wife.

[fol. 19] III

That there are no minor children, the issue of said marriage.

IV

That there is no community property of the parties hereto.

V

That the plaintiff and defendant have lived separate and apart for more than three (3) consecutive years last past and immediately preceding the commencement of this action, without cohabitation.

Wherefore, plaintiff prays judgment:

1. That he be granted an absolute decree of divorce dissolving the bonds of matrimony existing between plaintiff and defendant, and that the parties hereto be released from all the obligations thereof and restored to the status of single persons.

2. Plaintiff also prays for general relief.

Ham & Taylor, by A. W. Ham, Attorneys for Plaintiff.

STATE OF NEVADA,
County of Clark, ss:

William F. Esenwein, being first duly sworn according to law, deposes and says:

[fol. 20] That he is the plaintiff in the above entitled action;-that he has read the foregoing Complaint and knows the contents thereof and that the same is true of his own

knowledge except as to any matters therein stated upon information and belief, and as to those matters he believes it to be true.

William F. Esenwein.

Subscribed and sworn to before me this 5th day of August, 1941. A. W. Ham, Notary Public in and for the Said County of Clark, State of Nevada. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed Aug. 5, 1941. Lloyd S. Payne, Clerk, by Jean Purdue Deputy

AFFIDAVIT FOR ORDER OF PUBLICATION OF SUMMONS

STATE OF NEVADA,
County of Clark, ss:

William F. Esenwein, being first duly sworn upon oath, deposes and says:

[fol. 21] 1. That I am the plaintiff in the above entitled action. That the Complaint in said action was duly filed with the Clerk of this Court on the 5th day of August, 1941, and Summons therein thereupon duly issued.

2. That the said action is an action for divorce upon the ground of three years separation without cohabitation, all of which fully appears in plaintiff's verified Complaint on file herein, reference to which is hereby made and the same by reference made a part hereof.

3. That the said May H. Esenwein is a necessary and proper party defendant to said action for the reason that this is an action for divorce and she is the wife of plaintiff.

4. That I have fairly and fully stated the facts of the case to Ham & Taylor, my attorneys and counsel herein, and I am by them advised and I verily believe that I have a good cause of action in this suit against the said defendant, as will fully appear by my verified Complaint hereinbefore referred to.

5. That the said defendant, May H. Esenwein, is not a resident of the State of Nevada and cannot be found therein; that the said defendant's last known and present place of residence and address is Fort Pitt Hotel, Pittsburgh, Pennsylvania. That personal services of summons herein cannot be made or had upon the said defendant for the reason that she is within the State of Pennsylvania and not within the State of Nevada.

[fol. 22] Wherefore, I ask for an order that service of summons herein be made upon said defendant by publication and that personal service may be had upon said defendant without the State of Nevada in lieu of service by publication and mailing.

William F. Esenwein.

Subscribed and sworn to before me this 5th day of August, 1941. A. W. Ham, Notary Public in and for the Said County of Clark, State of Nevada. (Seal.)

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

No. 12316

William F. Esenwein, Plaintiff,

vs.

May H. Esenwein, Defendant

Endorsed. Filed Aug. 5, 1941. Lloyd S. Payne, Clerk, by Jean Purdue Deputy

Order for Publication of Summons

Upon reading and filing the affidavit of William F. Esenwein, plaintiff herein, and upon the records and files herein, and it satisfactorily appearing therefrom to me, the Judge

of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, that May H. Esenwein, the [fol. 23] defendant herein, resides out of this state; and it appearing from the said affidavit that a cause of action exists in this action in favor of the plaintiff and against the defendant, May H. Esenwein, and that the said defendant is a necessary and proper party defendant thereto; and it further appearing therefrom that the last known and present place of residence and address of the said defendant is Fort Pitt Hotel, Pittsburg, Pennsylvania; and that personal service of summons herein cannot be made or had upon the said defendant for the reasons hereinbefore mentioned, and by the said affidavit made to appear, on motion of Ham & Taylor, attorneys for the plaintiff, it is,

Ordered that service of summons in this action be made upon the defendant by publication thereof in the Las Vegas Evening Review-Journal, a newspaper published daily, except Sundays, at Las Vegas, Clark County, Nevada, which said newspaper is hereby designated by the Court as the paper most likely to give notice to said defendant, and that such publication be made at least once a week for four consecutive weeks.

And it further appearing, in like manner, that the last known and present place of residence and address of said defendant is Fort Pitt Hotel, Pittsburgh, Pennsylvania, it is hereby

Ordered that a copy of the summons and a certified copy of the Complaint in this action be forthwith deposited in the Post Office at Las Vegas, Nevada, postpaid, directed to [fol. 24] the said defendant at her said address.

It is further ordered that personal service may be had upon said defendant without the State of Nevada in lieu of service by publication and mailing.

Dated this 5th day of August, 1941.

George E. Marshall, District Judge.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Sep. 8, 1941. Lloyd S. Payne, Clerk, by Eva Perry, Deputy

PROOF OF SERVICE

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

I, Louis F. Silhol, being first duly sworn according to law depose and say:

That I am now, and at all times herein mentioned, was a citizen of the United States of America, over the age of twenty-one years; that at the City of Pittsburgh, State of [fol. 25] Pennsylvania, on the 7th day of August, 1941, I personally served the annexed summons upon the defendant therein named, May H. Esenwein, by delivering to and leaving with the said defendant, personally, a copy of the said summons and showing to and reading to said defendant the original summons hereto annexed; that at the same time and place I delivered to and left with the said defendant a certified copy of the Complaint on file in said action; that the person so served was personally known to me to be the defendant therein named; that I am not a party to the above entitled action and am not related to either of the parties thereto and am in no wise interested in the outcome thereof.

Dated this 7th day of August, 1941.

Louis F. Silhol

Subscribed and sworn to before me this 7th day of August, 1941. Sue B. Fritz, Notary Public in and for the Said County and State. My Commission expires February 21, 1943. (Seal.)

[fol. 26] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Returned and Filed

Endorsed 19—. Filed Sep. 8, 1941. Lloyd S. Payne, Clerk, by Eva Perry, Deputy Clerk; —— ——, Deputy

SUMMONS

The State of Nevada Sends Greetings to Said Defendant —— ——:

You are hereby summoned to appear within ten days after the service upon you of this summons if served in said County, or within twenty days if served out of said County but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above entitled action.

This action is brought to recover judgment dissolving the bonds of matrimony existing between you and the plaintiff upon the ground of three years separation without cohabitation, all of which fully appears in plaintiff's verified Complaint on file herein, reference to which is hereby made and the same by reference made a part hereof.

[fol. 27] Dated this 5th day of August, A. D. 1941.

Lloyd S. Payne, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for Clark County, Nevada. Ham & Taylor, Las Vegas, Nevada, Attorney for Plaintiff By Jean Purde, Deputy. (Seal.)

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Sep 8-1941. Lloyd S. Payne, Clerk. By Jean Rasmussen, Deputy.

DECREE OF DIVORCE

This action coming on regularly for trial before the Court on this 8th day of September, 1941, Ham & Taylor appearing as attorneys for the plaintiff, the defendant having been duly served with Summons and having failed to appear, plead or answer within the time provided by law [fol. 28] and default having been regularly entered against the said defendant, upon the Complaint of the plaintiff and all the records and files herein, and the plaintiff introducing evidence in support of the allegations of his Complaint, the defendant not introducing evidence, and the Court being fully advised in the premises,

The Court Finds:

1. That the Court has jurisdiction of the parties hereto and of this cause of action.

2. That the plaintiff is now, and for more than six weeks last past, immediately preceding the filing of this action, has been a bona fide resident of the County of Clark, State of Nevada, and has continuously resided and been physically present and domiciled during all of said period in said County of Clark.

3. That the plaintiff and defendant intermarried at the city of Pittsburgh, State of Pennsylvania, on or about the 22nd day of November, 1899, and they ever since have been, and still are husband and wife.

4. That there are no minor children, the issue of said marriage.

5. That there is no community property of the parties hereto.

6. That the plaintiff and defendant have lived separate and apart for more than three (3) consecutive years last past and immediately preceding the commencement of this [fol. 29] action, without cohabitation, and ever since have so continued to so live separate and apart.

7. That all the allegations of plaintiff's Complaint are true.

Now Therefore, by reason of the law in such cases made and provided and the Court deeming this a proper case therefor, on motion of Ham & Taylor, Attorneys for plaintiff,

It is Ordered, Adjudged and Decreed, that the bonds matrimony now and heretofore existing between the plaintiff, William F. Esenwein, and the defendant, May H. Esenwein, be, and the same are hereby wholly dissolved and a decree of absolute divorce is hereby granted plaintiff and each of the parties hereto are hereby restored to the status of single persons.

Dated and done in open Court this 8th day of September, 1941.

George E. Marshall, District Judge.

[fol. 30] In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

No. 12316

William F. Esenwein, Plaintiff,

vs.

May H. Esenwein, Defendant

Filed ——, 19—. Endorsed. Filed—Sep. 8-1941. Lloyd S. Payne, Clerk. By Eva Perry Deputy Clerk.

Praecipe for Default

To the Clerk of the above entitled Court:

The defendant above named, May H. Esenwein, having been duly and regularly served with process herein, and

having failed to appear in said action and having failed to answer or otherwise plead herein, and more than 30 days having elapsed since said service, and being in default, you are hereby requested and directed to enter the default of said defendant.

Dated this 8th day of September, 1941.

Ham & Taylor, By: A. W. Ham, Attorneys for Plaintiff.

[fol. 31] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Filed —— —, 19—. Endorsed. Filed—Sep. 8, 1941. Lloyd S. Payne, Clerk. By Eva Perry, Deputy Clerk.

DEFAULT

It appearing from the files and records in the above entitled action that May H. Esenwein defendant herein, was duly served with Summons on the 7th day of August, A. D. 1941, at the County of Allegheny, State of Pennsylvania, and that more than 30 days, exclusive of the day of service, have expired since said service upon the defendant, and no answer or demurrer having been filed or other defense made by defendant, and no further time having been granted, the default of May H. Esenwein defendant herein in failing to answer or make defense to plaintiff's complaint, is hereby entered.

Witness my hand and the Seal of said Court, this 8th day of September, A. D. 1941.

Lloyd S. Payne, Clerk. By Eva Perry, Deputy Clerk. (Seal.)

[fol. 32] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed. Filed—Sep. 8, 1941. Lloyd S. Payne, Clerk. By Eva Perry, Deputy.

AFFIDAVIT

I, William F. Esenwein the plaintiff above named, do hereby certify that I know of my own knowledge that the defendant above named is not now, nor was he within sixty days prior to the making of this affidavit: (a) In the military service of the United States, or (b) in training or service with the land or naval forces of the United States, or (c) a member of any reserve component of such forces on active duty for a period of more than one month.

William F. Esenwein.

Subscribed and sworn to before me this 8th day of September, 1941.

A. W. Ham, Notary Public, Clark Co., Nevada.
(Seal.)

[fol. 33] IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

No. 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant

Endorsed: Filed Sep. 9, 1941. Lloyd S. Payne, Clerk, by Jean Rasmussen, Deputy.

Before the Honorable George E. Marshall, District Judge

9:25 A. M., September 8, 1941.

A. W. Ham, Esq., Attorney for plaintiff.

Complaint filed August 5, 1941; Affidavit and Order for Publication of Summons; Proof of Service, Summons, Praecipe for Default, Default and Affidavit re Military Service on file.

WILLIAM F. ESENWEIN was called as a witness in his own behalf, and after being first duly sworn was examined by Mr. Ham and testified as follows:

Q. State your name, please, Mr. Esenwein.
A. William F. Esenwein.
Q. You are the plaintiff in this action?
A. Yes, sir.
Q. Are you acquainted with May H. Esenwein, the defendant?
A. Yes, sir.
Q. What relationship, if any, does she bear to you?
A. My wife.
[fol. 34] Q. Where do you live, Mr. Esenwein?
A. Las Vegas.
Q. When did you first become a resident of Las Vegas, Clark County, Nevada?
A. June 23, 1941.
Q. Were you present in the City of Las Vegas, Clark County, Nevada, every day from and including June 23, 1941, to and including August 5, 1941?
A. Yes, sir.
Q. And you have been here continuously since August 5th?
A. Yes, sir.
Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?
A. Yes, sir.
Q. Have you retained that intention ever since?
A. Yes, sir.
Q. And you have it now?
A. Yes, sir.
Q. Where were you and the defendant married?
A. Pittsburgh.
Q. Pennsylvania?
A. Pennsylvania.
Q. When?
A. November 22, 1899.
Q. And you have been husband and wife ever since?
A. Yes, sir.
Q. Are there any children the issue of the marriage?
A. Yes, sir.
Q. No minor children?

A. No minor children.

Q. Is there any community property belonging to you and the defendant?

A. No, sir.

Q. You allege in your complaint that you and the defendant have lived separate and apart for more than 3 consecutive years last past and immediately preceding the [fol. 35] commencement of this action without cohabitation, is that correct?

A. Yes, sir.

Q. And that condition has continued since the filing of the action?

A. Yes, sir.

Q. When did you and the defendant separate?

A. On October 31, 1919.

Q. And have you lived separate and apart without cohabitation continuously since October 31, 1919?

A. Yes, sir.

Q. And when you were living together, you and your wife didn't get along?

A. No, sir.

Q. You do not believe it possible that you and she would ever live together again?

A. It is not possible.

By the Court: No questions.

Albert Jenkins was called as a witness on behalf of the plaintiff, and after being first duly sworn was examined by Mr. Ham and testified as follows:

Q. State your name, please?

A. Albert Jenkins.

Q. You reside in Las Vegas, Clark County, Nevada, Mr. Jenkins?

A. Yes.

Q. And have for a number of years last past?

A. Yes, sir.

Q. Are you acquainted with William F. Esenwein, the plaintiff in this action?

A. Yes, I am.

Q. When did you first meet Mr. Esenwein?

A. On June 23, 1941.

[fol. 36] Q. Have you seen him in Las Vegas, Clark County, Nevada, every day from and including June 23, 1941 to the present time?

A. Yes, I have.

By the Court: A decree may be granted.

I Hereby Certify that the foregoing is a full, true and correct transcript of my shorthand notes taken in said action.

Martha Lundy, Reporter Pro Tem.

STATE OF NEVADA,
County of Clark, ss:

I, Lloyd S. Payne, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original, Number 12316

WILLIAM F. ESENWEIN, Plaintiff,

vs.

MAY H. ESENWEIN, Defendant.

Complaint, Affidavit for Order for Publication of Summons, Order for Publication of Summons, Proof of Service, Summons, Decree of Divorce, Praecipe for Default, Default, Affidavit of Non-Military Service, Reporter's Transcript.

together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

[fol. 37] In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this 25th day of January, 1943.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark. (Seal.)

STATE OF NEVADA,
County of Clark, ss.:

I, GEORGE F. MARSHALL, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Lloyd S. Payne is County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Lloyd S. Payne, as such officer; that the seal annexed thereto is the seal of said District Court; that said Lloyd S. Payne, as such clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

[fol. 38] In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this 25th day of January, A. D. 1943.

George E. Marshall, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

STATE OF NEVADA,
County of Clark, ss.:

I, LLOYD S. PAYNE, County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto) do hereby certify that George E. Marshall, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Ju-

dicial District of the State of Nevada, in and for the County [fol. 39] of Clark, this 25th day of January, 1943.

Lloyd S. Payne, County Clerk of the County of Clark, State of Nevada, and *ex-officio* Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark. (Seal.)

In County Court of Allegheny County

Order Granting Rule

And now, Feb. 1st, 1943, the foregoing petition having been presented in open court, upon consideration thereof, on motion of counsel for petitioner, it is ordered that said petition be filed and that a rule be and it is hereby granted upon the said May H. Esenwein, prosecutrix, to show cause why the prayer of said petition should not be granted, returnable the 11th day of Feb., 1943, service of notice of the filing of said petition and of the entry of this rule to be made upon the said prosecutrix by delivering to her a copy of said petition and this order, but omitting a copy of Exhibit A attached thereto, either personally or by registered mail directed to her last known address.

Lencher, J.

[fol. 40] In County Court of Allegheny County

Answer—Filed February 8, 1943

State of Ohio,
County of Cuyahoga, ss.:

Before me, the undersigned competent authority, personally appeared Wm. F. Esenwein, who being duly sworn according to law, deposes and says, by way of answer to the rule to show cause issued in this case and returnable February 10, 1943, as follows:

1. Affiant has already filed in this case a petition for the vacation of the current order of support and has obtained a rule to show cause which is returnable February 11, 1943.

2. As set forth in affiant's said petition, affiant is no longer the husband of the prosecutrix. He is legally divorced from her.

Affiant therefore prays that both said rules be heard by the Court at the same time and that his said rule be made absolute and that the rule obtained by the prosecutrix be discharged.

Wm. F. Esenwein.

Sworn to and subscribed before me this 6th day of February 1943.

William E. Stroup, Notary Public. (Seal.)

My Commission expires Feb. 22, 1945.

[fol. 41] In County Court of Allegheny County

Answer to Petition—Filed February 17, 1943

And Now, to wit, this 17th day of February, 1943 comes the above May H. Esenwein, respondent named in the Petition of William F. Esenwein, and makes Answer as follows:

First: The historical facts and docket entries referred to by Petitioner in the First Paragraph of his Petition are admitted.

Second: The averments contained in the Second Paragraph of said Petition as far as they relate to the mere fact of a decision having been handed down by the U. S. Supreme Court in Williams, *et al.* vs. State of North Carolina, are admitted.

As to whether or not said decision overruled the case of Haddock vs. Haddock (201 U. S. 562), if material to the present issue, is not a matter of pleading, but is a question of judicial interpretation; and is therefore not admitted.

Third: Respondent, May H. Esenwein, denies that petitioner was divorced from her by a decree entered on September 8th, 1941 by the Eighth Judicial District Courts of the State of Nevada in and for the County of Clark; on the contrary if such a pretended decree exists it is and was at all times, a nullity, and absolutely of no legal force, effect or validity, for the reason that the matters which

said proceedings and Decree in Nevada attempted to open up, deal with, and adjudicate, had, prior thereto, been already decided, and fully and completely adjudicated by the [fol. 42] Courts of the State of Pennsylvania and were therefore *Res Adjudicata;* and said adjudication of the Pennsylvania Courts were and became binding under the full, faith and credit clause of the United States Constitution, upon the State of Nevada and upon all other States.

The said pretended Nevada "Decree", and the contents, substance and provisions thereof and therein are likewise a nullity, and of no legal force, effect or validity.

It is denied that by reason of the said case of Williams, *et al.* vs. State of North Carolina, or for any other reason whatsoever that the said alleged Decree of Divorce in Nevada is "entitled to full faith and credit in this court"; but on the contrary, said Nevada "decision", being a complete legal nullity, cannot and will not be recognized in Pennsylvania.

Fourth: Admitted.

Fifth: It is denied that "Petitioner is no longer the husband of the prosecutrix and has not been such since September 8th, 1941, when the duty to pay support to prosecutrix ceased", but on the contrary it is stated that the petitioner, William F. Esenwein, now is, and at all times since November 22nd, 1899, the date of marriage, was and continues to be, the husband of the prosecutrix, to-wit, the respondent herein, May H. Esenwein; and that the duty to pay her support has not ceased at any time, but continues in full force and *affect*.

[fol. 43] Sixth: For further answer respondent avers and says that the said proceedings in Nevada resulting in a so-called decision or decree in divorce in favor of petitioner, were conceived and executed in fraud both upon the States and Courts of Nevada and Pennsylvania.

Wherefore, respondent May H. Esenwein prays that the Petition of her husband, William F. Esenwein, for revocation of the Order of Court for her support, be dismissed at the Costs of said Petitioner.

May H. Esenwein.

Duly sworn to by May H. Esenwein. Jurat omitted in printing.

[fol. 44] In County Court of Allegheny County

Petition for Amendment of Petition for Revocation of Order of Support and for Other Relief

Filed February 26, 1943

To the Honorable, the Judges of said Court:

The petition of William F. Esenwein respectfully represents:

First: That he desires to amend and supplement his petition previously filed in this proceeding, in which he prayed for the entry of an order vacating the previous order of support and for the dismissal of this proceeding, in the following respects, to wit:

a. In and by the petition which he presented to this Court on July 22, 1942, petitioner set forth that he was a resident of Cleveland, Ohio, and that he had been divorced from the prosecutrix on September 8, 1941, but he did not present to this Court for adjudication his right to plead said divorce as a defense to the claim of the prosecutrix for support. His failure to do so was occasioned by the fact that he was then obliged to abide by the then prevailing rule of law in this state to the effect that his Nevada divorce did not entitle him to such a release.

b. Petitioner is advised and believes and therefore avers that the promulgation of a new rule of law as to the effect of foreign divorce decrees, brought about by the decision of the Supreme Court of the United States in the decision [fol. 45] rendered December 21, 1942 in the case of Williams and Hendrix vs. the State of North Carolina constituted such a change in the conditions and circumstances of the parties to this present litigation, occurring since the entry by this Court of the order of December 8, 1942, as to entitle petitioner to a revocation of said order.

Petitioner therefore prays that his petition of February 1, 1943 be amended in the foregoing particulars.

Petitioner prays further that your Honorable Court open the aforesaid order of December 8, 1942, in order that petitioner may now include in his said petition, presented July

22, 1942, an allegation to the effect that he was then legally divorced from the prosecutrix and no longer her husband.

Petitioner prays further that in view of the shortness of time, the Court accept this petition without his signature and verification.

Feb. 26, 1943.

William F. Esenwein, By F. C. Houston, Sidney J. Watts, *His Attorneys.*

ORDER

And now, to-wit, this 26th day of February, 1943, the foregoing petition being presented in open court, upon [fol. 46] consideration thereof and on motion of counsel for petitioners, it is ordered that the said petition be filed and that the amendment prayed for, of the petition filed herein on February 1, 1943, be and the same is hereby allowed; and petitioner's prayer for opening of the order of December 8, 1942 is hereby refused.

Gunther, *J.*

IN THE COUNTY COURT OF ALLEGHENY COUNTY

No. C 287 of 1922

COMMONWEALTH, ex rel., MAY H. ESENWEIN,

vs.

WILLIAM F. ESENWEIN

Transcript of Official Notes of Proceedings

Hearing held before Hon. Blair F. Gunther, *J.* Pittsburgh, Pennsylvania, Thursday, February 18th, 1943, at 1:30 p. m. E. W. T.

On Petition for Revocation of Order of Support.

APPEARANCES:

For petitioner: S. J. Watts, Esq., F. C. Houston, Esq., Louis F. Silhol, Esq.

For Respondent: N. J. Lippard, Esq., Jacob Seligsolin, Esq.

Reported by C. E. Urban, Official Reporter, 530 Court House, Pittsburgh, Penna.

[fol. 47] PETITIONER'S CASE.

Mr. Watts: If Your Honor please, I wish to state into the record that, this morning, we served upon Attorney N. J. Lippard a notice that we would at this hearing ask the Court to take judicial notice of the common law and statutes of the State of Nevada with respect to the subject of divorce and, particularly, the provisions of the statutes of said State with respect to the requirements of residence by the Libellant, Substitute Service of Process upon non-resident Respondents, causes for granting of divorces, etc.

Now, Mr. Lippard, I ask you if you will admit that service was made?

Mr. Lippard: I will admit the service was made, but we ask the Court not to take judicial notice of the laws of the State of Nevada inasmuch as the State of Nevada has not taken judicial notice of the laws of the State of Pennsylvania.

The Court: There is no question but that the documents are all right. They are verified and certified.

Mr. Seligsohn: The notice in question, addressed to N. J. Lippard, Esq., Attorney for the Prosecutrix, was, to my knowledge, left at the office of Mr. Lippard, 421 Frick Building, today, February 18, 1943, at a time when he was absent from his office, and upon my arrival at his office the notice [fol. 48] was exhibited to me by his secretary. I wish to state on the record that we object to any introduction of any attempt to have this court take judicial notice of the common law and statutes of the State of Nevada with respect to the subject of divorce and, particularly, the requirements of the statutes of said State with respect to the requirements of residence by the Libellant, Substitute Service of Process upon non-resident respondents, causes for the granting of divorces, etc., for the reason that this is an attempt to lay a basis for the introduction of this case of a decree made September 8, 1941 by the courts of Nevada, which decree we are going to maintain, as this hearing proceeds, was fraudulent.

Mr. Watts: I must interpose an objection to the remarks of counsel as being absolutely irrelevant. I take it to be in order for counsel to object to something when and as it is offered, but not to go on making a speech about something that has not been offered.

The Court: The Court will sustain the objection as far as judicial notice is concerned and ask counsel to produce his documents and proceed.

(Objection sustained and exception noted.)

Mr. Watts: In order that this Court may have a clear understanding of what is before it, I wish to read into this record the substance or averments of the original Petition. [fol. 49] *Mr. Seligsohn:* In what jurisdiction? Where?

Mr. Watts: In this case. In this court.

To wit, the paper I have before me which is headed by the word "Information." "County of Allegheny, S. S., before me, the Clerk of the County Court in and for the County of Allegheny, personally came May H. Esenwein, wife of Defendant, who, upon oath duly administered according to law, deposes and says that, at Bellevue, Pennsylvania, in the County of Allegheny, on the blank day of March, A. D., 1920, Defendant aforesaid, William F. Esenwein.

1. Has without reasonable cause—"

Mr. Seligsohn: I object to the offer of this "Information" at this time because this hearing does not pertain to the Information that was made in the beginning of this case; this hearing was based entirely on the Petition for Revocation of Order of Support, which order was dated December 8, 1942, and that is the matter we are concerned with primarily. If counsel wants to consider that matter and that Petition, all right, as that is the matter we are called upon to decide today.

The Court: Objection overruled. Exception.

(Objection overruled and exception noted.)

Mr. Watts (Continuing:) "1. Has without reasonable cause separated himself from his wife May H. Esenwein [fol. 50] and children May H. age nineteen years and William H. age sixteen years.

2. Has neglected to maintain his wife May H. Esenwein and children as above, contrary to the provision of the Act of Assembly in such case made and provided.

Complainant therefore prays and desires that a warrant may issue, and that defendant may be arrested and held to answer this charge of Desertion and Non-Support and further deponent saith not."

The Information was sworn to and filed under date of March 13, 1922.

Now, if Your Honor please, I wish to offer in evidence the averments of the first two paragraphs of our Petition which are admitted by the Answer which was served on us yesterday, namely:

"First. This proceeding was commenced by the above named prosecutrix to compel petitioner as her husband to contribute to her support. As the clerk's docket entries show, the Order as originally entered has been frequently modified. The most recent Order was entered under date of December 8, 1942, whereby arrearages in payment were reduced to One Thousand Dollars and the monthly rate reduced to Seventy-Five Dollars. Petitioner has paid the said sum of One Thousand Dollars."

Also averments of the second paragraph:

"Second. Shortly after the entry of said Order of December 8, 1942, the Supreme Court of the United States handed down its decision in the case of Williams and Hendrix, Petitioners, vs. The State of North Carolina, No. [fol. 51] 29 October Term, 1942. Said decision was filed on December 21, 1942, and in and by the same the former decision of said Court as rendered in Haddock vs. Haddock, 201 U. S. 562 was overruled."

Mr. Seligsohn: That is not admitted. At this point, we wish to state for the record that the Answer to the Petition filed in this case does not, on its face, admit that part of the second paragraph of the Petition for Revocation of Order of Support relating to Haddock versus Haddock, but on the contrary the Answer to the Petition, second part of the second paragraph, reads as follows:

"As to whether or not said decision overruled the case of Haddock vs. Haddock, 201 U. S. 562, if material to the present issue, is not a matter of pleading, but is a question of judicial interpretation; and is therefore not admitted."

Therefore, we move to strike from the record the part read by Mr. Watts as follows: "Said decision was filed on December 21, 1942, and in and by the same the former decision of said Court as rendered in Haddock vs. Haddock, 201 U. S. 562 was overruled." That part, we ask be stricken

from the record. I do not admit it, but on the contrary, I deny it, and he reads it in as pleading admitted.

Mr. Watts: Before the Court rules on the motion, I wish to call the attention of the Court to the language of Mr. Justice Douglas as it appears on page 216 of Volume 63, Su- [fol. 52] preme Court Reporter, in the Williams case, in which Mr. Justice Douglas said, "Haddock vs. Haddock is overruled", Mr. Justice Douglas having written the majority opinion of the Court.

Mr. Seligsohn: I still object to Mr. Watts pretending I admitted something which I did not admit.

The Court: You have the right to object and I believe the Court has the right to read both the paragraphs contained in the Petition and Answer and decide for itself. It is a question of fact for the Court and a question of law. (Exception noted.)

Mr. Watts: Further, in support of our Petition, we now offer in evidence the Exemplification of the Record of the case of William F. Esenwein vs. May H. Esenwein as filed in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, No. 12316, with particular reference to the Decree of Divorce which appears as a part of said Exemplification, entered under date of September 8, 1941, in which the Court, finds, among other things, "that the plaintiff is now, and for more than six weeks last past, immediately preceding the filing of this action, has been a *bona fide* resident of the County of Clark, State of Nevada, and has continuously resided and been physically present and domiciled during all of said period in said County of Clark." And, with reference also to the concluding paragraph of said Decree in which "it is ordered, adjudged, and [fol. 53] decreed, that the bonds of matrimony now and heretofore existing between the plaintiff, William F. Esenwein, and the defendant, May H. Esenwein, be, and the same are, hereby wholly dissolved and a decree of absolute divorce is hereby granted plaintiff and each of the parties hereto are hereby restored to the status of single persons"; Said Exemplification being certified by the Clerk of said court, evidenced by the seal of said court thereto attached and the signature of said Clerk being certified to by George E. Marshall, Judge of said court, and the signature of said Judge being in turn certified to be the Clerk of said court with the seal of said court attached, said

certification being in accordance with the provisions of the Act of Congress which appears in 28 U. S. C. A., Section 687.

Mr. Seligsohn: At this time, counsel for May H. Esenwein, the Prosecutrix, Respondent in this case, objects to the introduction into the record of the Exemplification of the Record just read and just offered for the reason that there is more to this case than would appear merely upon the face of such Exemplification. We object to all the contents embraced within that Exemplification, particularly the alleged Decree of Divorce and the statement of the Court in Nevada that Libellant William F. Esenwein had obtained a proper legal residence or domicile in good faith in the State of Nevada, for the reason that the jurisdiction of the court in Nevada depended, not merely upon six weeks residence prior to the bringing of the Libel, but also depended upon a [fol. 54] *bona fide* intention on the part of William F. Esenwein to remain in Clark County, Nevada, making that County his domicile indefinitely, whereas it is true and a fact that said William F. Esenwein, having obtained the Decree of Divorce in Nevada, allegedly, on September 8, 1941, did go to Cleveland, Ohio, the very next month.

The Court: You are going into the legal effect of this document. The only thing we have now is the presentation of this Exemplification as evidence. Do you say that is the true Exemplification or do you deny that is the Exemplification?

Mr. Seligsohn: We deny the entire jurisdiction of the document and we object to it.

The Court: The objection is overruled and exception is noted.

(Objection overruled and exception noted.)

(Argument off record.)

Mr. Watts: If your Honor please, we request the Court to take judicial notice of an Act of the Legislature of the State of Nevada as appears in the Statutes of Nevada for the year 1931 at page 159 in which it is said, with respect to the matter of service, "When publication" [illegible] personal service [illegible] copy of the Summons [illegible] of the State shall be equivalent to personal service [illegible] deposit in the post office [illegible]

[fol. 55] served shall have thirty days after said service to appear and answer or demur."

I call your Honor's attention to the fact that that method of service was followed in the Nevada case as shown by the Exemplification.

Mr. Seligsohn: We object to the introduction of the matter just offered by Mr. Watts and we also object to the entire proceeding in Nevada as having been without jurisdiction and an attempt to deal with a matter already *Res Judicata*. Our position in this case is that since Nevada had no jurisdiction and since the entire proceedings in Nevada were in fraud, since the matter had been *Res Judicata*, we do not care anything whatsoever about the laws of Nevada because the Decree which purports to be a Decree in Divorce is really an absolute nullity for want of jurisdiction and by reason of fraud for the reason that it had been *Res Judicata*, prior, in Pennsylvania.

The Court: The objection is overruled, and an exception noted.

(Objection overruled, exception noted.)

Mr. Watts: I also ask the Court to take judicial notice of an Act of the Legislature of the State of Nevada as it appears in the Statutes of Nevada for the year 1939 at page 16, reading, in part, as follows:

"Section 1. Divorce from the bonds of matrimony may be obtained in addition to the causes now provided by law and [fol. 56] subject to the same procedure and requirements for the following cause:

When the husband and wife have lived separate and apart for three consecutive years without cohabitation the Court may, in its discretion, grant an absolute Decree of Divorce at the suit of either party."

We call the attention of the Court to the fact and circumstance, that, as appears by this Exemplification, the ground or cause of divorce upon which the Court based its decree, is this very cause or charge permitted by this Act of 1939.

Mr. Seligsohn: We object to the introduction of those grounds for divorce in Nevada for the same reasons as I stated in my last objection; on the ground of fraud and——

The Court: Are you objecting to the Court taking judicial notice as requested by Mr. Watts, or are you objecting to the introduction of the documents as immaterial to the case?

Mr. Seligsohn: I am objecting that they are immaterial to the case for the reason that the Nevada Court had no jurisdiction. It was *Res Judicata* in Pennsylvania; there was no domicile according to Nevada Law in Nevada; there [fol. 57] was no intention to remain permanently in Nevada; and the matter was *Res Judicata* in Pennsylvania prior to September 8, 1941.

(Argument off record.)

The Court: There is an objection on the record to the Court taking judicial notice of the grounds for divorce in Nevada, is that correct?

Mr. Seligsohn: Yes, sir. That is correct.

The Court: The Court will not take judicial notice of the grounds for divorce in Nevada insofar as they interfere in the same matter adjudicated in the State of Pennsylvania, but the Court will admit your statement of the facts as to what constitutes grounds for a divorce in Nevada unless there is no truth to it. You do not deny——

Mr. Seligsohn: We say it is entirely incompetent, irrelevant and immaterial because, as we will show, there was no jurisdiction in the court of Nevada for the reasons I have already stated on the record in connection with my objection.

The Court: Objection overruled. Exception noted.

(Objection overruled and exception noted.)

[fol. 58] *Mr. Watts:* I wish to ask if counsel for the prosecutrix considers that the divorce granted by the Nevada court was legal and valid in the State of Nevada?

Mr. Seligsohn: That pretended divorce which is in the Exhibit [illegible] you have exhibited to the stenographer today, Mr. Watts, and which [illegible] is absolutely invalid in Nevada for the reason that the court in Nevada did not, at any time, have jurisdiction of the

parties or of the subject matter because the law of Nevada requires two things: First, the necessary six weeks residence in the County where the complaint is brought, before the complaint is brought, and in addition thereto a bona fide intention to remain in that County, in this case Clark County, Nevada, and where it has been proved by events that the petitioner in that case, in violation of his pretended sworn statement that he intended to remain there in Nevada, came immediately after September 8, 1941, to Cleveland, Ohio.

(Argument off record.)

Mr. Watts: In view of the unresponsive nature of the answer by counsel to my inquiry with respect to the validity of this decree in Nevada as a final decree of a court of that State, I ask your Honor to take judicial notice also of the decision of the Supreme Court of the State of Nevada in the case of Lamb vs. Lamb, 57 Nevada, page 421, 1937,——

[fol. 59] *Mr. Seligsohn:* I object to the statement of counsel that my answer was not responsive. If anything, it was too responsive. I answered that I did not believe that Nevada had jurisdiction and, therefore, the Nevada divorce was a nullity.

The Court: Did you get your answer, Mr. Watts?

Mr. Watts: Let me finish this offer:

(Continuing) ——which, if consulted, your Honor, will appear to be a case in Nevada of a six weeks residence there by parties from Connecticut which was challenged by the respondent in the proceedings but the decision of the Trial Court granting the divorce was affirmed. This is one of the cases which was referred to by Mr. Justice Douglas in his opinion in the Williams case as setting forth the construction put by the Supreme Court of Nevada upon their divorce statutes with respect to residence.

The Court: This Court will take judicial notice of the fact that in the State of Nevada there is a law requiring six weeks' residence for divorce.

Mr. Seligsohn: Will your Honor take judicial notice also of the fact that it requires a bona fide intention to remain there? Will your Honor please put that on the record also.

[fol. 60] *The Court:* It is assumed that the residence is bona fide.

Mr. Watts: It has been so found by the Decree of the Court. That is our case, if your Honor please.

(Petitioner rests.)

(Argument off record.)

The Court: I cannot take judicial notice of the laws of Nevada as far as this particular case is concerned. An exception is noted to Mr. Watts. (Exception noted.)

Mr. Seligsohn: At this time, counsel for respondent, May H. Esenwein, moves to strike from the record and to dismiss all the testimony, documents, exemplifications, laws, and cases offered by the petitioner, William F. Esenwein, in this case which relate to the State and courts of Nevada.

The Court: The motion is refused and an exception is noted.

(Motion refused and exception noted.)

(Whereupon, at the hour of 4:30 P. M., Court adjourned to continue on Friday, February 26, 1943 at 2:00 o'clock P. M.)

(Friday, February 26, 1943, at 2:00 o'clock P. M.) (Hearing resumed.)

Mr. Watts: If the Court please, at the hearing last week we had put in substantially all the evidence that we had [fol. 61] in support of our Petition. In the meantime, further research inspired us to amplify our Petition and I now desire to present a Petition entitled, "Petition For Amendment Of Petition For Revocation Of Order Of Support And For Other Relief". This is an amendment of our Petition of February 4, 1943. The opinion of the Supreme Court came down December 21, and it took a few weeks for a person's ideas to become clarified or to the point at least where a Petition could be prepared.

Mr. Seligsohn: I might say that this should be presented to Mr. Lippard who is familiar with this case and knows all about the arrangements with which I have nothing to do, but I will say that I certainly will object to it because it does not take up the paragraphs of the last which reads: "Petitioner prays that the Court grant an Honorable Court open

the aforesaid order of December 8, 1942, in order that petitioner may now include in his said petition, presented July 22, 1942, an allegation to the effect that he was then legally divorced from the prosecutrix and no longer her husband." It is almost akin to asking the Court to sign an Order which would not be an Order but an Adjudication.

The Court: We do not want to open the Order of Non Support. We are only going to open the Order to let you in on the Amendment. What is the Order of December 8th?"

Mr. Watts: It is the Order made by Judge McKim on our petition of July, 1942, setting forth that there were arrear-[fol. 62] ages but that Mr. Esenwein's income had become so reduced that he sought a reduction in the amount of the current monthly Order and Judge McKim heard that petition,—petition and answer, and deposition taken in Cleveland,—and made that order reducing the arrearages to One Thousand Dollars and the monthly amount to Seventy-five Dollars.

(Discussion off record)

The Court: I am refusing to open the Order of December 8, 1942, but it is within the discretion of this court to allow this amendment. (Exception noted.)

Mr. Watts: If the Court please, with respect to these matters covered by sub-paragraphs "a." and "b." of this petition, I wish to refer the Court to the Petition of July 22, 1942, to the testimony which was taken by disposition in Cleveland in support of that petition and to the decree of this court as entered by President Judge McKim, for the purpose of substantiating the averments of these two sub-paragraphs of this petition. With that addition, our case is completed.

PROSECUTRIX-RESPONDENT'S CASE

Mr. Sellinsgrove: I wish to state for the record that we object to the introduction into this record or the interpretation of any amendment offered into this record that might have for its objective an adjudication or such adjudication that [fol. 63] the parties in this case are recognized other than as husband and wife in Pennsylvania.

The Court: Objection overruled. Exception.

(Objection overruled and exception noted.)

Mr. Seligsohn: If the Court please, Mr. Lippard has asked me to make this motion at the beginning of the proceedings:

We move that the petition in this case, for revocation of the order of this court, be forthwith dismissed unless the petitioner shall first comply with an order of this court already made and respect and obey that order for the support of May H. Esenwein, which order has not been respected and obeyed to the present date.

The Court: Motion is refused. Exception.

(Motion refused and exception noted.)

The Court: The petitioner has the right to file his appeal as a matter of course.

Mr. Seligsohn: The order has not been paid. What does Your Honor think ought to be done about this order?

The Court: I think it should be paid, but I cannot deny him his right to appeal.

[fol. 64] *Mr. Watts:* Mr. Esenwein is a non-resident and, therefore, not amenable to process of capias or bench warrant. I am instructed to say that when and as his case is adjudicated all arrearages will be promptly paid.

Mr. Seligsohn: That is what we object to. He has no right to assume to stay the order of this court until he sees fit or until he sees what the result of the present proceedings will be. We think that is in contempt of the court.

The Court: We are refusing the motion at this time. Now, is there anything in evidence as to a stipulation. Can you both agree that this case was before the courts of Pennsylvania and these are the same parties?

Mr. Watts: I cannot agree to anything like that.

Mr. Seligsohn: Will you agree that the William F. Esenwein and May H. Esenwein in the Superior Court decision, 141 Super. 604, are the same parties as those in this action?

Mr. Watts: I have no objection to agreeing to the fact of the identity of the parties, but I object very strenuously to the relevancy or materiality of the fact that there was such litigation at that time.

The Court: You agree as to the identity of the parties?

[fol. 65] *Mr. Watts:* Yes, sir.

Mr. Seligsohn: All right.

I now wish to state, for the record, what we intend to prove to clarify our position.

Mr. Watts: I object to proof of a case in such manner.

The Court: Objection sustained. Counsel will proceed with his evidence and if there are any objections Mr. Watts may object.

(Objection sustained, and an exception noted.)

Mr. Seligsohn: Depositions were taken in this case in which William F. Esenwein testified, in Cleveland, Ohio.

Mr. Watts: I have a copy of the deposition. I have already asked the court to take cognizance of it. If there is any portion of this deposition that you wish to offer verbatim, please indicate what it is by page and line.

Mr. Seligsohn: I refer to page 2 of the deposition of William F. Esenwein taken on Wednesday, November 19, 1942, before Roy C. Green.

Mr. Watts: What do you want to show now by line? What is there in that deposition that the Court cannot read as well as we can?

[fol. 66] *Mr. Seligsohn:* I have offered it as part of the record in this case. It was taken at 1857 Union Commerce Building, Cleveland, Ohio. I refer to page 2 of that deposition, Direct Examination of Mr. Esenwein by Mr. Houston:

> "Q. Mr. Esenwein, your name is William F. Esenwein and you are the petitioner in this case?
>
> A. Yes, sir.
>
> Q. Where do you live, Mr. Esenwein?
>
> A. 2635 North Moreland Boulevard, Cleveland, Ohio."

Also at page 6, Cross Examination of William F. Esenwein by Mr. Thomas:

> "Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?
>
> A. Since some time in October, 1941.
>
> Q. And prior to that time you were a resident of Las Vegas, Nevada?
>
> A. Yes, sir."

We offer these particular lines and call them, particularly, to the Court's attention in this case. May we state

now, with the permission of the Court, that I will read from the Exemplification from Nevada in this case:

"In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, No. 12316."

From the testimony in that case, as shown by the Exemplification:

"Q. State your name, please, Mr. Esenwein.

A. William F. Esenwein.

[fol. 67] Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Are you acquainted with May H. Esenwein, the defendant?

A. Yes, sir.

Q. What relationship, if any, does she bear to you?

A. My wife.

Q. Where do you live, Mr. Esenwein?

A. Las Vegas.

Q. When did you first become a resident of Las Vegas, Clark County, Nevada?

A. June 23, 1941.

Q. Were you present in the City of Las Vegas, Clark County, Nevada, every day from and including June 23, 1941, to and including August 5, 1941?

A. Yes, sir.

Q. And you have been here continuously since August 5th?

A. Yes, sir.

Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?

A. Yes, sir.

Q. Have you retained that intention ever since?

A. Yes, sir.

Q. And you have it now?

A. Yes, sir."

That is for the purpose of a comparison of the testimony in the records.

[fol. 68] I now refer to Corpus Juris, Volume 19, page 30, part of Sections 42 and 43, which I offer in evidence.

Mr. Watts: If the Court please, I object to this method of proof because, under the Uniform Taking of Notice of

Foreign Statutes Act of the State, the Court is permitted to take judicial notice of the common law and statutes of Nevada or of any other State; furthermore, under that Act to which I refer, it is unnecessary for counsel to read into the record those books to which the Court may make reference under its power to take judicial notice thereof.

The Court: The objection is sustained.

(Objection sustained and an exception noted.)

Mr. Seligsohn: Do I understand I am only to refer to the books without reading them?

The Court: You can refer to them, offer them in evidence and call the Court's attention to the pages in them to which you refer.

Mr. Seligsohn: All right. I refer to Corpus Juris, Volume 19, page 30, Item 7, entitled: "Facts Constituting", under the subject of "Divorce", being the first part, about one half of Sections 42 and 43, also introducing the Nevada law.

[fol. 69] *Mr. Watts:* That is objected to as incompetent as proof of anything relevant to this case for the reason that is not the proper way to prove either the common law or statute law of Nevada.

The Court: The objection is sustained. (Objection sustained and an exception noted.)

Mr. Seligsohn: I will now call the Court's attention to the case of Presson versus Presson, 38 Nevada Supreme Court, page 203, in regard to residence; also at page 206 and page 207 regarding residence and especially the decision that residence is made up of fact and intention; that is, of an abode with intention to remain. We offer this case in evidence and call Your Honor's attention to it, and we ask Your Honor to take judicial notice of it.

We now refer to the case of Walker vs. Walker, Volume 45, Supreme Court of Nevada, page 105, dealing with the same subject matter as in the case just cited. We offer this case in evidence and ask Your Honor to take judicial notice of this case.

Mr. Watts: Could we shorten this by having Mr. Seligsohn refer to any decision of the Supreme Court of the State of Nevada or any statute of that State in the brief that he submits to the Court, with the same privilege to myself?

[fol. 70] *Mr. Seligsohn:* I would be able to do that, anyhow.

The Court: Then, why clutter the record at this time? I

would like to hear some evidence that pertains to this particular case.

Mr. Seligsohn: Your Honor, the only evidence will be law; that is, in reference to the law and what the situation is, legally, in this case. (Discussion off record.)

Mr. Seligsohn: In the case of Walker vs. Walker,—I have been trying to present these briefly,—will the Court take judicial notice of that case?

The Court: Counsel should know that the Court is bound to do that anyway.

Mr. Seligsohn: I now refer to the case of Andrews vs. Andrews, 188 United States Supreme Court Reports, Page 14, relating to residence and jurisdiction. As I understand, Mr. Watts agrees that these parties William F. Esenwein and May H. Esenwein are the same parties as referred to in 141 Superior Court, 604.

Mr. Watts: The identity is not in question.

Mr. Seligsohn: On the subject of Res Adjudicata, I wish [fol. 71] to call Your Honor's attention to the fact that the case of William H. Esenwein, in divorce, against M. H. Esenwein, being the same parties as in this case, was adjudicated upon the same ground of action as appeared in the Exemplification,—substantially the same ground of action,—to wit, "Desertion", and that the court in that case reversed the decree of the court below which granted the decree; that, thereby, the Superior Court refused the decree to William F. Esenwein in divorce and adjudicated the action of desertion between these same parties covering a portion of the same period of time, towit, from the time that they were separated in 1919 and upward to the present time. We offer this case, not merely as evidence of *Res Adjudicata*, but also state that it was entitled to full faith and credit in all other States under the Constitution of the United States, Article 4, Section 1. This is our own Pennsylvania Superior Court Report, and with reference to Article 4, Section 1, I am asking Your Honor to take judicial notice of this case which is yet and was, in 1940, *Res Adjudicata*, prior to the year 1941 when the courts of Nevada attempted to deal with the same subject matter between the same parties and adjudicate the same action.

Mr. Watts: The offer is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled. Note an exception. (Objection overruled and an exception noted.)

[fol. 72] *Mr. Seligsohn:* I will also ask the Court to take judicial notice of the fact that Shepards Pennsylvania Citations, copy of which is in our Allegheny County Law Library, say that no appeal was taken from this decision,—141 Pennsylvania Superior Court, Page 604,—to the Supreme Court or any other court whatsoever.

I also call Your Honor's attention to the case of William F. Esenwein vs. May H. Esenwein, 77, Supreme Court of Pennsylvania,——

The Court: Is that 77?

Mr. Seligsohn: 77.

Mr. Watts: It is Supreme Court 312.

Mr. Seligsohn: Yes, Volume 312, Pennsylvania Supreme Court, page 77, being an action in divorce appealed to said court between these same parties in which a prior attempt to obtain a divorce on substantially the same subject matter had been refused and was refused by the Supreme Court of Pennsylvania in the year 1933, and I ask your Honor to take judicial notice of that case: 312, Pennsylvania Supreme Court,—between the same parties.

Mr. Watts: I interpose the same objection; the general objection.

[fol. 73] *The Court:* The objection is overruled. Exception. (Objection overruled and an exception noted.)

Mr. Seligsohn: In order to show that the actions are substantially the same causes of actions in Pennsylvania in Volume 141, Superior Court Reports as are referred to in the Exemplification proceedings in Nevada, I wish your Honor to take judicial notice of our own Pennsylvania Divorce Act of 1929, P. L. 1237, Section 1 and Section 10 D.

The Court: Is there any question as to the fact that there were the same grounds for divorce presented in Pennsylvania as were presented in Nevada?

Mr. Watts: Very much of a question. With reference to the Pennsylvania Statute, that is objected to also, generally.

The Court: The objection is overruled. (Objection overruled and an exception noted.)

Mr. Seligsohn: Now, by comparison, we refer to the Nevada Compiled Laws, Supplement 1931-1941, Volume 2, Page 1280, Section 9467.06, entitled: "Additional Cause for Divorce" which reads:

"Divorce from the bonds of matrimony may be obtained, in addition to the causes now provided by law [fol. 74] and subject to the same procedure and re-

quirements, for the following causes: When the husband and wife have lived separate and apart for three consecutive years without cohabitation, the Court may, in its discretion, grant an absolute decree of divorce at the suit of either party."

Do you admit that is the law of Nevada, Mr. Watts?

Mr. Watts: Certainly. I already offered it.

Mr. Seligsohn: You did read it into the record without objection.

I now refer, if your Honor please, to the case of Miller vs. Miller, 54 Nevada Supreme Court, 44, reading on page 49——

Mr. Watts: I object to have that read into the record.

The Court: Just offer it in evidence.

Mr. Seligsohn: I offer, especially, the parts on page 49 in the middle of the page and at the bottom of the page dealing with the very pertinent question of the subject matter and dealing especially with the particular point of law as adjudicated in Nevada that by varying the form of action one does not estop the operation of the principles of *Res Judicata*, which point is again referred to at page 51 in said [fol. 75] volume, and I ask your Honor to take judicial notice of this case, Miller vs. Miller. We consider it very important.

I now refer to the case of Silverman vs. Silverman, 52, Nevada, Page 152, Nevada Supreme Court,—

Mr. Watts: Will your Honor assure counsel that it is unnecessary to read that.

The Court: It is unnecessary to read it.

Mr. Seligsohn: (Continuing)—with special reference to Pages 158 and 170 thereof, and ask the Court to take judicial notice.

I call your Honor's attention to our own case, to 316, Pennsylvania Supreme Court, Page 153, being the case of Wallace's Estate, with regard to the principles of *Res Judicata*, that the principles are the same in Nevada as they are in Pennsylvania.

I will call your Honor's attention to the Full Faith and Credit Clause in the Constitution of the United States, Article 4, Section 1, and take the position that it covered the State of Pennsylvania; that in 1940 you were entitled to full faith and credit in every State of the Union, in the United States, especially in this case where the State of

Nevada attempted to deal with the same subject matter in 1941.

In view of the law as we have read it, if the Court finds it to be as represented, we will ask that this Petition be dismissed, especially on the ground that it has been adjudicated, is now *Res Judicata* and was prior to the time that [fol. 76] Nevada attempted to deal with it; that the attempt on the part of Nevada, after this case was adjudicated, to tell our courts to throw our decisions out of the window and accept the mandate of foreign jurisdiction is in contempt to our sovereign State of Pennsylvania and its courts.

The Court: I am going to refuse the Petition for Revocation of Order of Support and note an exception.

(Petition refused and an exception noted.)

Testimony closed.

CERTIFICATES

I HEREBY CERTIFY that the proceedings in the above entitled matter were reported stenographically by me and that the foregoing pages contain the correct transcript of my stenographic report.

C. E. Urban, *Official Reporter.*

The Stenographic fee for the transcript in the foregoing case is $7.60, chargeable against Allegheny County.

C. E. Urban, *Official Reporter.*

[fol. 77] ORDER APPROVING RECORD ON PROCEEDINGS

The foregoing record of the proceedings upon the hearing of the above cause is hereby approved, made a part of the record and directed to be filed.

Blair F. Gunther, *Trial Judge.*

IN COUNTY COURT OF ALLEGHENY COUNTY

ORDER REFUSING PETITION FOR REVOCATION OF ORDER OF SUPPORT, ETC.—Filed February 26, 1943

And now to-wit this 26th day of February, 1943, the above entitled case came on for hearing on the Petition for the Revocation of the Order for Support, (and as amended),

and on the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support; and after hearing, it is ordered that the original petition for the Revocation of the Order for Support (and as amended), is refused, and the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support, is made absolute; County pay the costs.

By the Court, Gunther, *J.*

In County Court of Allegheny County

Opinion—Filed March 26, 1943

Gunther, *J.*,

The prosecutrix in the instant case initiated an action against the defendant under date of March 13, 1922, alleging desertion without reasonable cause in March of 1920 and charging desertion and non-support. An order of support was entered and frequently modified thereafter. The most recent order was entered December 8, 1942, whereby arrearages in payment were reduced to One Thousand Dollars and the monthly rate reduced to Seventy five Dollars. [fol. 78]

It is now contended through a Petition for Revocation of Order of Support and hearing held thereon that the Order of Court in the within case would be revoked. In support of this contention defendant introduced into evidence the Exemplification of the Record of the case of William F. Esenwein v. May H. Esenwein as filed in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, No. 12316, entered under date of September 8, 1941, wherein it appears that a decree of absolute divorce was granted libellant, William F. Esenwein, the defendant in this action. It is further contended by the defendant in this action, that the decision of the Supreme Court of the United States filed December 21, 1942, in the case of Williams, *et al.* v. The State of North Carolina, No. 29 October Term, 1942, Supreme Court Reporter, Vol. 63, Page 207, makes it imperative upon this Court to revoke the Order of Court in the instant cause of action, for the reason that full faith and credit must be given to the judg-

ment and decree of the sister state, in this instance, the State of Nevada.

If full faith and credit must be given to the Public Acts Records and Judicial Proceedings of Nevada by Pennsyl-[fol. 79] vania, apropos the status of the parties in this case, full faith and credit in reference to said status should have been given to the Public Acts Records and Judicial Proceedings of Pennsylvania by Nevada in its process of dissolving the marriage contract between the prosecutrix and defendant in this case.

The Eighth Judicial District Court of the State of Nevada should have had before it and should have considered the case of William F. Esenwein v. May H. Esenwein at No. 276 April Term, 1940, 141 Pa. Superior Court, Page 604, wherein said Court reversed the decree of the lower court granting divorce on the ground of desertion; wherein it is pointed out that William F. Esenwein left the common abode in 1919, alleging for such action intolerable and cruel treatment by May H. Esenwein, and, that it was determined by the decision of the Supreme Court at No. 312 Pa. 77 on March 20, 1933, his allegations in this respect were not sustained, affirming the order of the Superior Court at No. 105 Pa. Superior Court, 264, reversing the decree of the lower court in favor of William F. Esenwein and dismissing the libel in divorce.

William F. Esenwein failed to prove a willful and malicious desertion by his spouse, May H. Esenwein, as so held by the Superior Court of Pennsylvania, and said decision under date of October 4, 1940, unappealed from, has become final.

The parties, cause, and the issue are the same at No. 276 April Term, 1940, 141 Pa. Superior Court, 604, entered under date of October 4, 1940, first heard, and the subse-[fol. 80] quent case of No. 12316 of the Eighth Judicial District Court of the State of Nevada under date of September 8, 1941, and the doctrine of *res judicata* is applicable. Public policy demands an end to litigation. The whole cause of action in the Nevada case is the same as in the Pennsylvania case first had, and the issues actually adjudicated in the prior Pennsylvania proceeding were readjudicated in the Nevada proceeding.

Wallace's Estate, 316 Pa. 148, 153; Bickley v. Pennsylvania P. A. C., 148 Pa. Super. 399, 405; 1st Trust Co. v. Phila. Distilling Co., 327 Pa. 145, 148; Silverman v. Sil-

verman, 52 Nevada 152; Miller v. Miller, 54 Nevada 44; Vickers v. Vickers, 45 Nevada 274. Accordingly the prayer for a revocation of the order of Support in this Court cannot be sustained.

[fol. 81] In the Superior Court of Pennsylvania

No. 326

No. 233 April Term, 1943
No. 234 April Term, 1943
No. 235 April Term, 1943

Commonwealth ex rel. May H. Esenwein

v.

William F. Esenwein, Appellant

Appeal from the Order of the County Court of Allegheny County at No. 287 of 1922, entered under date of December 8, 1942; Appeal from the Order of the County Court of Allegheny County at No. 287 of 1922, entered under date of February 26, 1943, refusing defendant's prayer for the opening of the Order of December 8, 1942; Appeal from the Order of the County Court of Allegheny County at No. 287 of 1922, entered February 26, 1943, refusing defendant's prayer for the vacation of the Order of December 8, 1942

No. 326

Opinion—Filed July 16, 1943

Opinion by Kenworthey, J.:

In 1901, the Supreme Court of the United States held that the jurisdiction of a state court granting a divorce may be inquired into and, if it appear that neither of the parties had acquired a bona fide domicil in that state at the time of instituting proceedings the decree is open to collateral attack and a recital in the proceedings that such domicil existed may be contradicted. Bell v. Bell, 181 U. S. 175, 21 S. Ct. 551; Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237.

In 1906, it held that a state court, *even of the plaintiff's domicil*, could not render a judgment in divorce that would

be entitled to enforcement in other states against a nonresident who did not appear and was not personally served [fol. 82] of the process.[1] Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525.

On December 21, 1942, it overruled Haddock v. Haddock (Williams v. State of North Carolina, 317 U. S. 287, 63 S. Ct. 207), it held that if plaintiff in a divorce proceeding acquires a bona fide domicil in the state which grants him a divorce, the decree is entitled to full faith and credit. This did not in the least impair the authority of the earlier decision in Bell v. Bell that domicil, not merely the residence, of one of the parties (there the plaintiff) must be established to support a binding decree where there is substituted service.

Were it not for the misleading press notices and the generally confused discussion of the Williams Case emanating, perhaps, from the somewhat extravagant language in the dissenting opinion of Mr. Justice Jackson,[2] it would scarcely be necessary to point out the limited effect of this decision. We shall discuss it briefly.

Mr. Williams and Mrs. Hendricks had long been domiciled in the State of North Carolina; they were both married to others. In 1940, they went to Las Vegas, Nevada, and after remaining the few weeks required by Nevada law, were granted divorces, intermarried and returned to North Carolina where they set up housekeeping as husband and wife. They were promptly indicted and convicted of bigamy. They defended by offering in evidence the Nevada decrees. The jury were instructed to find them guilty if either (1) they had not acquired a bona fide domicil in Nevada, or (2) if their matrimonial domicil was in North [fol. 83] Carolina and the Nevada divorces had been procured without personal service in Nevada or without an appearance by the defendant-spouse. When the case was

[1] Unless, of course, the state is also the state of the matrimonial domicil. Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544.

[2] For example: "It is not an exaggeration to say that this decision repeals the divorce laws of all states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there." 63 S. Ct. 219.

argued in the Supreme Court, the state did not seek to sustain the judgment on the ground the domicil was a sham. As said by Mr. Justice Douglas, "* * * it [the state] admits that there probably is enough evidence in the record to require the petitioners to be considered 'to have been actually domiciled in Nevada.'" (63 S. Ct. 210). He painstakingly pointed out that the court was not overruling Bell v. Bell. "If the case had been tried and submitted on that issue [validity of the domicil] only, we would have quite a different problem, as Bell v. Bell indicates." (Page 210). "Domicil of the plaintiff, immaterial to jurisdiction in a personal action is recognized in the Haddock case and elsewhere (Beale, Conflict of Laws, § 110.4) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance. The findings made in the divorce decrees in the instant case must be treated on the issue before us as meeting those requirements. For it seems clear that the provisions of the Nevada statute that a plaintiff in this type of case must 'reside' in the State for the required period requires him to have a domicil as distinguished from a mere residence in the state. Latterner v. Latterner, 51 Nev. 285, 274 P. 194; Lamb v. Lamb, 57 Nev. 421, 65 P. 2d 872. Hence the decrees in this case like other divorce decrees are more than in personam judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power." (Page 213). "We thus have no question on the present record whether a divorce decree granted by the courts of one state to a [fol. 83a] resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada." (Page 215).

The case was sent back; presumably for the very purpose of retrial on the issue whether the Nevada domicils were bona fide. Not only do we think the language of the majority opinion reaffirms Bell v. Bell, but if the court had been of opinion that a mere residence for the required

period would support a valid decree it would have directed that defendants be discharged.

We now come to a consideration of the facts of the present case.

The parties were married in 1899. They have not lived together since 1919. In 1920, the husband instituted divorce proceedings in Allegheny County and obtained a decree of divorce in 1932 on the ground of indignities. On appeal, this court reversed and dismissed the libel (105 Pa. Superior Ct. 261, 161 A. 425); the order was affirmed by the Supreme Court (312 Pa. 77, 167 A. 350). In 1939, the husband again instituted divorce proceedings in Allegheny County, charging desertion; the lower court again granted a divorce which was reversed by this court (141 Pa. Superior Ct. 604, 15 A. (2d) 735).

In June 1941, the husband went to Las Vegas, Nevada, and on September 8, 1941, was granted a divorce on the ground that the parties "had lived separate and apart for more than three consecutive years last past and immediately [fol. 84] preceding the commencement of this action, without cohabitation," a ground not recognized by our divorce laws. The wife was not served in Nevada and she did not enter an appearance although she was served in Pennsylvania.

The present petition is for the revocation of an order for support made in March 1922 and subsequently modified several times. The basis of the petition for revocation is the Nevada divorce decree. Com. ex rel. v. Parker, 59 Pa. Superior Ct. 74. In her answer, the wife contended that the Nevada decree is invalid for two reasons: (1) The court had no jurisdiction because the husband did not establish a bona fide domicil,[1] and (2) res adjudicata. The lower court refused to revoke the order. The husband appealed.

[1] The answer does not specifically mention either jurisdiction or domicil; it alleges that the Nevada proceedings "were conceived and executed in fraud both upon the states and courts of Nevada and Pennsylvania." The questions of jurisdiction and domicil were orally presented to us and subsequently discussed at length in a supplemental brief and we shall consider the question as though it had been specifically raised. See Taggart v. De Fillippo et al., 315 Pa. 438, 173 A. 423.

The Nevada decree is prima facie valid and the burden of proving the contrary was on appellee. Com. ex rel. Cronhardt v. Cronhardt, 127 Pa. Superior Ct. 501, 193 A. 484. The evidence reveals that appellant had been domiciled in Allegheny County for many years, but that since October 1941 he has been living in Cleveland, Ohio. Although the record does not reveal it, we were told at the oral argument that during his brief stay in Nevada he stayed at a hotel. We were also told at the oral argument that we could assume he left Nevada immediately after obtaining his divorce. Under the circumstances, we are of opinion that, in spite of his testimony given in the divorce proceeding that he had moved to Nevada intending to make Las Vegas his permanent place of residence and had retained that intention up to the date of the hearing (Sep- [fol. 85] tember 8, 1941), his Nevada residence was merely for the purpose of obtaining the divorce; he did not establish a bona fide domicil in the absence of proof of other circumstances which, under our decisions, are regarded as the essentials of domicil. See Dorrance's Estate, 309 Pa. 151, 163 A. 303. See also the learned discussion by Judge Gordon in Meng v. Meng, D & C. And until the Supreme Court of the United States gives us a different test of domicil, we apply our own. See Restatement, Conflict of Laws, § 10.

In our opinion the Nevada decree was invalid for the reasons just stated and the order of the court will be affirmed. We have not been asked to recognize the Nevada decree on the ground of *comity*. There is, perhaps, some doubt whether we could even if we were so inclined. See Goodrich, Conflict of Laws, § 19. It is obviously not a case for the application of the principle. The ground upon which the divorce was granted in Nevada is not a ground recognized by this commonwealth; appellant undoubtedly went there for the purpose of evading our laws under which his previous attempts to obtain a divorce were frustrated; the legitimacy of children is not involved; and there are no other circumstances which at all appeal to us. Compare Com. v. Custer, 145 Pa. Superior Ct. 535, 21 A. (2d) 424, where the authorities are discussed at length by President Judge Keller.

In view of our conclusion, it is unnecessary to discuss at length the question whether the Nevada decree was invalid on the additional ground that, because of the previous de-

cisions of this court against him, appellant's right to a divorce was res adjudicata. Refusal of a divorce on one ground is not a bar to procuring it in another action on a different ground. Viney v. Viney, 151 Pa. Superior Ct. 86, [fol. 86] 29 A. (2d) 437; Restatement, Judgments, § 74 comment d. Moreover, res adjudicata is a legal defense which must be raised in the initial proceeding or it is deemed to have been waived. Walter v. Baldwin, 126 Pa. Superior Ct. 589, 193 A. 146. It cannot be made the basis of a collateral attack on a judgment or decree which is otherwise valid. Richardson's Estate, 132 Pa. 292, 19 A. 82; Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641; Restatement, Conflict of Laws, § 431. And it would follow that, if the Nevada court had jurisdiction of the subject matter and the parties, appellee's attempt to raise the defense in the court below came too late.

The orders are affirmed, costs in each appeal to be paid by appellant.

[fol. 86a] In Supreme Court of Pennsylvania

Assignments of Error

1. The Superior Court erred in dismissing appellant's assignment of error, filed in that court, which said assignment and the court's judgment thereon, as contained in its final order, are as follows:

"The court below erred in entering its order of February 26, 1943, which said order reads as follows (R. 77a):

"Order of Court

And, now to wit this 26th day of February, 1943, the above entitled case came on for hearing on the Petition for the Revocation of the Order for Support, (and as amended), and on the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support; and after hearing, it is ordered that the original petition for the Revocation of the Order for Support (and as amended), is refused, and the Rule on defendant to show cause why he should not be attached for failure to comply with the Order for Support, is made absolute; County pay the costs.

By the Court, Gunther, J."

"The orders are affirmed, costs in each appeal to be paid by appellant."

2. The judgment of the Superior Court deprives appellant of the rights and privileges conferred upon him by Article 4, Section 1 of the Constitution of the United States, and by the Act of Congress, relating to certification of judicial proceedings, being R. S. Sec. 905, 28 U. S. C. A., Sec. 687.

Sidney J. Watts, Fred C. Houston, Attorneys for Appellant.

September 9, 1943.

[fol. 87] In Supreme Court of Pennsylvania

Commonwealth ex Rel. May H. Esenwein

v.

William F. Esenwein, Appellant.

Docket Entries

Appeal from the judgment of the Superior Court, at No. 235 April Term, 1943 (Allegheny County). August 12, 1943, Appeal allowed (Miscellaneous Docket No. 1280A). August 18, 1943, Appeal filed and writ exit. August 24, 1943, Petition of appellant to place case on list for week beginning September 27th, 1943 at Pittsburgh and for an order permitting him to file eight copies of the printed Record as filed in this case in the Superior Court, filed. August 26, 1943, Answer to petition filed. August 27, 1943, Record; Testimony; Envelope marked "Deposition of William F. Esenwein taken before Roy C. Green, Commissioner, on Wednesday, November 19, 1942, at Cleveland, Ohio"; letter from Squire, Sanders & Dempsey addressed to William H. Frasher, Clerk, dated December 2, 1942, filed. FVI.

Order

Sept. 3, '43

Per Curiam:

The prayer of the within petition is granted.

Sept. 9, 1943, Assignments filed.

October 1, 1943, Argued — 219.

October 23, 1943, Petition of Wells C. Phelps for leave to intervene, filed.

ORDER

Oct. 26, '43.

PER CURIAM:

The petitioner is granted leave to file a brief if he so desires.

DECISION

January 3, 1944

Judgment affirmed at appellant's costs.

Linn, J.

C. J. Maxey and Mr. Justice Drew Dissent. (Dissenting Opinion filed by Mr. Justice Drew in which Mr. Chief Justice Maxey joins).

[fol. 88] ORDER

And now, January 6, 1944, it is ordered that the Prothonotary of this Court shall hold the record in this case for the period of ninety days, during which time the defendant-appellant shall have the right to file in the Supreme Court of the United States a petition for certiorari, as provided by law.

George W. Maxey, C. J.

January 18, 1944. Praecipe of defendant designating portions of record to be incorporated in certified transcripts of record for Supreme Court of United States, filed.

For Appellant: Fred C. Houston, Sidney J. Watts, Baker & Watts. For Appellee: N. J. Lippard, Jacob Seligson.

[fol. 89] IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, MARCH TERM, 1944

No. 5

COMMONWEALTH ex Rel. MAY H. ESENWEIN

v.

WILLIAM F. ESENWEIN, Appellant

Appeal from the Judgment of the Superior Court at No. 235, April Term, 1943, Which Affirmed the Order of the County Court of Allegheny County at No. 287 of 1922, Entered Feberuary 26, 1943, Refusing Defendant's Prayer for the Vacation of the Order of December 8, 1942

OPINION OF THE COURT—Filed January 3, 1944

LINN, J.:

William F. Esenwein appeals from judgment of the uperior Court affirming the action of the County Court of Allegheny County refusing to revoke an order made for the support of his wife. The parties were married in Pittsburgh in 1899; they separated in 1919. The support order has been in effect since 1922. In 1932 he sued for a divorce on the ground of indignities, but failed: *Esenwein v. Esenwein*, 105 Pa. Superior Ct. 261, 161 A. 425; affirmed, 312 Pa. 77, 167 A. 350. He sued again in 1939 on the ground of desertion but failed again: 141 Pa. Superior Ct. 604, 15 A. 2d 735.

On November 12, 1942, he applied to the County Court for a reduction in the amount of the order. He averred, inter alia, that he had become a resident of Nevada on June 30, 1941, and on September 8, 1941, had obtained a decree of divorce. The court, on December 8, 1942, reduced the order to $75 a month.

On February 1, 1943, he filed the petition now before the court for revocation of the support order on the ground of the Nevada divorce decree, relying on *Williams and Hendricks v. North Carolina*, 317 U. S. 287. To that petition his wife filed an answer averring, inter alia, "that the said proceedings in Nevada resulting in a so-called decision or decree in divorce in favor of petitioner were conceived and executed in fraud both upon the states and courts of

[fol. 90] Nevada and Pennsylvania." After hearing, that issue was found in favor of the wife and the petition to revoke was dismissed. The husband appeals.

The question is whether the rejection of the Nevada decree, as ground to revoke the order, is consistent with the full faith and credit requirement of the federal Constitution and the Act of Congress.

There is no doubt of the power of the courts below to inquire into the jurisdictional facts necessary to confer jurisdiction on the Nevada court: *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Andrews v. Andrews*, 188 U. S. 14; *German Savings and Loan Society v. Dormitzer*, 192 U. S. 125; *Com. ex rel. v. Yarnell*, 313 Pa. 244, 251; Beale, Conflict of Laws, (1935) sections 111.1 and 111.2.

In making that inquiry the material to be examined is the record presented; it consists of the support order * concededly valid; the husband's petition to revoke, the wife's answer, the evidence, which included the Nevada proceeding and decree, produced at the hearing in the County Court. We must also take into consideration the facts formally admitted at the argument before the Superior Court.**

If Esenwein had presented nothing to the County Court but the duly certified divorce decree, he would have shown himself entitled to a revocation of the order unless his wife there produced evidence overcoming the prima facie effect of the decree. But he did not rest on the decree alone; he put in evidence the entire record of the Nevada proceeding leading up to the decree thus affording his wife opportunity [fol. 91] to make from it any inferences of fact relevant in the inquiry whether the jurisdictional fact of bona fide domicil existed. These inferences, with the admitted facts stated in the opinion of the Superior Court, clearly show that the jurisdictional fact of a Nevada domicil was lacking.

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* "The order of March, 1922 . . . the subject of frequent consideration as the Docket Entries, pages 1a et seq. show."

** "Although the record does not reveal it, we were told at the oral argument that during his brief stay in Nevada he stayed at a hotel. We were also told at the oral argument that we could assume he left Nevada immediately after obtaining his divorce."

Appellant went to Nevada about the end of June, 1941; lived in a Hotel, was divorced September 8, 1941, and left Nevada immediately afterward and established a residence in Ohio. His wife was not served in Nevada and did not appear though notified in accord with Nevada law. In the Nevada proceeding he testified: "Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence? A. Yes, sir. Q. Have you retained that intention ever since? A. Yes, sir. Q. And you have it now? A. Yes, sir." He gave that testimony on September 8th, received the decree on the same day and left Nevada immediately. His acts spoke louder than his words. If his testimony that on September 8th he had the "intention" of residing in Nevada, had been supplemented by the fact that he would leave the state immediately afterward, the court would have been justified in declining to make a finding that his Nevada domicil was bona fide. The court might very well have said, had it known the additional fact, that while the six-weeks residence required by the Nevada statute was established, his intention to leave immediately afterward prevented a finding that his domicil was in good faith. The prima facie inference is, and the Superior Court was authorized to make it, that, notwithstanding his testimony, he had no intention of making his domicil in Nevada. His Nevada case is no different in legal effect from what it would have been if he had never been in that state but had arranged to have someone falsely impersonate him at the hearing. In our inquiry into the legal effect of the record, a more difficult factual question might have been presented if Mr. Esenwein had given evidence in the County Court to the effect that notwithstanding his testimony in Nevada on September 8th, conditions developed immediately afterward which made it desirable that he should again change his domicil from Nevada to some other state. But he gave [fol. 92] no such evidence; though he was the moving party, he produced nothing to rebut the facts clearly inferable against him on the whole case. The Superior Court was therefore justified in adopting the natural or normal inference that appellant's proceeding in Nevada was a sham and fraud for the purpose of evading the order of the County Court of Allegheny County.

"The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live

elsewhere, Story on Conflict of Laws, § 43—or, as Mr. Dicey puts it in his admirable book 'the absence of any present intention of not residing permanently or indefinitely in the new abode. Conflict of Laws, 2d ed. 111.'" *Williamson v. Osenton*, 232 U. S. 619, 624. "The intention required for the acquisition of domicil of choice is an intention to make a home in fact, * * *." Restatement, Conflict of Laws, section 19. *Dorrance's Estate*, 309 Pa. 151, 163 A. 303. The essentials of a change of domicil from Pennsylvania or elsewhere to Nevada are not satisfied by the short sojourn in a Nevada hotel. For the purposes for which he now offers the divorce decree, it is not enough that on September 8, 1941, his word was accepted in Nevada, considering that the prima facie inference from his subsequent conduct is that, while testifying, he was misleading that court as to his domiciliary intent. Our conclusion is not inconsistent with the decision in Williams v. North Carolina, 317 U. S. 287; on page 302 it was said, "In the first place, we repeat that in this case we must assume that petitioners had a *bona fide* domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident, as distinguished from a domiciliary, is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada." The question thus reserved in the [fol. 93] Williams case is the one decided by the courts below against the appellant.

Judgment affirmed at appellant's costs.

C. J. Maxey and Mr. Justice Drew Dissent.

[fol. 94] In the Supreme Court of Pennsylvania, Western District, March Term, 1944

No. 5

Commonwealth ex rel. May H. Esenwein

v.

William F. Esenwein, Appellant

Appeal from the Judgment of the Superior Court at No. 235 April Term, 1943, which affirmed the Order of the County Court of Allegheny County at No. 287 of 1922, entered February 26, 1943, refusing defendant's prayer for the vacation of the Order of December 8, 1942.

Dissenting Opinion—Filed January 3, 1944

Drew, J.:

The Chief Justice and myself thoroughly disagree with the opinion and decision of the majority, because, in our best judgment, the record in this case is absolutely void of anything better than conjecture and suspicion to support the finding that appellant lacked a bona fide domicil in the State of Nevada at the time he instituted his action for divorce and obtained a decree there. If the judgment of a sovereign state can be lightly set aside, as appears to have been done here, then the full faith and credit clause of the National Constitution and the decision of the Supreme Court of the United States, in *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, are no protection. It seems to me that the majority completely ignores the fact that merely because its views as to the marriage relationship and the avenues of escape may differ from those of other states, or because there may be a hostile feeling toward decrees in divorce by many courts and among laymen, where the period of residence is comparatively brief, is no legal justification for circumventing the Federal Constitution.

There is no doubt in my mind that a decree in divorce of [fol. 95] one state can be collaterally attacked on the ground of want of good faith of domicil in another. While as a general rule a judgment or decree may not be impeached

collaterally, a different rule exists if the attack is based upon fraud or want of jurisdiction: *German Savings and Loan Society v. Dormitzer*, 192 U. S. 125, 24 S. Ct. 221; *Hunt v. Hunt*, 72 N. Y. 217; 34 C. J. § 815, p. 511. Jurisdiction of the court by which a judgment or decree is rendered in any state may be attacked collaterally in another state: *Thompson v. Whitman*, 85 U. S. 457; *Andrews v. Andrews*, 188 U. S. 14, 23 S. Ct. 237. A bona fide domicil being a jurisdictional fact, its existence is subject to challenge before the courts of other states, regardless of any recital or finding of "domicil" expressed or implied in the record: Freeman on Judgments, 5th ed., Vol. 3, § 1437, p. 2959; Black on Judgments, 2d ed., Vol. 2, § 931, p. 1373. It is proper to inquire into the jurisdiction of the court granting a decree in divorce and if it appear that neither party had acquired a bona fide domicil in that state at the time the proceedings were instituted, the decree is open to collateral challenge: *Bell v. Bell*, 181 U. S. 175, 21 S. Ct. 551; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 S. Ct. 553; Beale on Conflict of Laws, Vol. 1, § 111.2, p. 478; Wharton on Conflict of Laws, 3d ed., Vol. 1, § 223, pp. 463-4; and, in my opinion, there is nothing in *Williams v. North Carolina*, supra, which in any way should lead one to believe that the court there intended to overrule this previously enunciated principle.

When the foregoing legal principles are applied to the facts of the instant case, it at once clearly appears that unless there was a bona fide domicil acquired by appellant in Nevada when he brought his action for divorce there, his decree was subject to impeachment in this Commonwealth, since admittedly appellee was neither personally served nor entered an appearance in the Nevada proceeding. However, from a most careful study of the entire [fol. 96] record here, I am satisfied that there is nothing which could possibly justify the majority of this Court in finding that appellant lacked a bona fide domicil in Nevada.

At the hearing in the County Court, no witnesses were called by either side. Counsel for appellant offered in evidence certain undenied allegations of the petition; an exemplification of the record of the Nevada proceeding, wherein there was a specific finding that appellant was domiciled in that state when he instituted his action there, and competent testimony to support such finding; and requested the court to take judicial notice of various decisions and laws of the State of Nevada; and then rested.

Since a foreign decree, regular on its face, is entitled to a presumption of validity (*Delanoy* v. *Delanoy*, 216 Cal. 27, 13 P. 2d 719; *Corkum* v. *Clark*, 263 Mass. 378, 161 N. E. 912), the burden was then shifted to appellee to show by a preponderance of the evidence that appellant was not in fact so domiciled (*Com. ex rel. Cronhardt* v. *Cronhardt*, 127 Pa. Superior Ct. 501, 193 A. 484). As to where the burden of proof rests under such circumstances, it was said in *Cheever* v. *Wilson*, 76 U. S. 108: "It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicil. That she did reside in the county where the petition was filed is expressly found by the decree . . . The finding is clearly sufficient until overcome by adverse testimony."

Counsel for appellee, relying primarily upon the untenable defense that the previous decisions of our Pennsylvania courts in refusing to grant appellant's applications for divorce were res judicata of his suit instituted in Nevada, merely offered the following excerpts from appellant's testimony as contained in the Nevada record already in evidence (all of which fully supported the Nevada court's finding of bona fide domicil, rather than challenged it):

[fol. 97] "Q. Where do you live, Mr. Esenwein?

A. Las Vegas.

Q. When did you first become a resident of Las Vegas, Clark County, Nevada?

A. June 23, 1941.

Q. Were you present in the City of Las Vegas, Clark County, Nevada, every day from and including June 23, 1941, to and including August 5, 1941?

A. Yes, sir.

Q. And you have been here continuously since August 5th?

A. Yes, sir.

Q. When you came to Nevada you came with the intention of making Clark County, Nevada, your permanent place of residence?

A. Yes, sir.

Q. Have you retained that intention ever since?

A. Yes, sir.

Q. And you have it now?

A. Yes, sir." In addition to requesting the court to take judicial notice of certain decisions of the State of

Nevada, counsel for appellee read into the record the following statements made by appellant in a deposition taken on November 19, 1942, in Cleveland, Ohio, and which was filed by appellant in this proceeding:

"Q. Where do you live, Mr. Esenwein?

A. 2635 North Moreland Boulevard, Cleveland, Ohio.

Q. Mr. Esenwein, how long have you lived at 2635 North Moreland?

A. Since some time in October, 1941.

Q. And prior to that time you were a resident of Las Vegas, Nevada?

A. Yes, sir."

To acquire a domicil, a party must have his abode in one place, with intention of remaining there; and the elements of domicil are residence and animus manendi: *Di Brigida v. Di Brigida*, 116 N. J. Eq. 206, 172 A. 505. In the instant case, it is not denied that appellant took up a residence in the State of Nevada at the time he brought his action there and retained it until a short time after he obtained his decree. Giving the evidence adduced by appellee the fullest effect possible, at best it raises but a mere suspicion that the animus manendi may have been wanting. Conjecture and suspicion are not enough to rebut the presumption of the validity of a decree of a sister state (*Cheever v. Wilson*, supra). Certainly, such evidence is not the clear and convincing proof which is required. See 21 C.J.S. §100, p. 155.

It is obvious that because appellant on November 19, 1942, in Cleveland, Ohio, stated that he had lived in that [fol. 98] city since some time in October, 1941, does not in any way detract from the truthfulness of his testimony given in the Nevada proceeding on September 8, 1941, that he went to that state on June 23, 1941, with the intent of making it his permanent domicil and that he still retained that intention at that time. The record shows that appellant sold his business in the City of Pittsburgh, abandoned his domicil in Pennsylvania and took up one in Nevada, which he later changed to Ohio, and there has resided now for more than two years. This he had a perfect right to do. The mere fact that he procured a divorce in Nevada does not rebut the presumption of the good faith on his part in the acquisition of a domicil there. "The motive with which a change of residence is made is immaterial so long as there is a real intention to make the new residence a home":

Beale, Conflict of Laws, Vol. 1, §22.1, p. 161. Whether appellant's residence in Nevada was long or short is of no moment, since the finding of the court that he had an intention to make that state his domicil during his residence there has not been rebutted. See *Price* v. *Price*, 156 Pa. 617, 27 A. 291.

Appellant did not give up his domicil in this Commonwealth to evade the order of support here under consideration, for he continued to comply with it for the more than two years he had been a non-resident, and only applied for revocation of the order after the rendition of the decision by the United States Supreme Court, in *Williams* v. *North Carolina*, supra.

The Court of Appeals of New York, in its recent decision in In the *Matter of the Estate of Anna Holmes, Deceased*, (decided November 24, 1943), on facts quite analogous to those of the instant case, upheld the validity of a Nevada decree in divorce which was there being challenged. From the agreed state of facts there before the court, it appears that respondent-husband left New York State and went to Nevada in June, 1937, and there commenced an action for divorce against his wife, who was a domiciliary of New York, on the ground of extreme cruelty; that the wife did [fol. 99] not appear by attorney or in person and was not served personally with a summons, but merely by publication; that respondent obtained a decree in Nevada on September 18, 1937, and on the same day remarried; that in December, 1937, after respondent and his second wife had moved to New York State, the first wife commenced an action against respondent for a divorce on the ground of adulterous conduct with the second wife; that respondent filed an answer averring that he had already obtained a decree in Nevada; that the referee, to whom the case was referred in New York, found that respondent and his first wife had been residents of New York from the date of their marriage to the time of trial; that because of the adultery of respondent, the first wife was entitled to a decree; that a judgment in her favor became final in September, 1939, and no appeal therefrom was ever taken; that the second wife continued to reside in New York State until her death in January, 1942; that thereafter one Frances M. Lawson applied to the Surrogate's Court for letters of administration upon the estate of the second wife and the respondent-husband filed an answer alleging in substance that he was

the husband of the deceased and entitled to letters. On the issue as to whom letters should be granted, the Surrogate held that respondent was not the legal husband of decedent at the time of her death and, therefore, denied his petition, and the Appellate Division reversed and held that the Nevada decree must be recognized in New York State. In upholding the action of the Appellate Division, the Court of Appeals, speaking through Chief Judge Lehman, said:

"In the case we are now reviewing, the appellant [Frances M. Lawson] has not, in the agreed statement of facts or by presentation or offer of evidence, except the decision of the referee in the divorce action, challenged the decision of the Nevada court that the plaintiff had acquired a domicile in Nevada sufficient to support the jurisdiction of that court to adjudicate his marital status. Though the appellant has consistently contended that the courts of this State [fol. 109] may refuse to give full faith and credit to the Nevada decree he bases that contention primarily, if not exclusively, upon the decision of the Supreme Court of this State in the divorce action instituted here that the Nevada decree was invalid. Since that decision is, as we have said, not binding upon the respondent and since there is no other affirmative proof that the respondent was not domiciled in Nevada when he brought an action for divorce there, we must apply the rule long authoritatively established by the Supreme Court of the United States: 'There can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Savings and Loan Society* v. *Dormitzer*, *ante*, page 125.' (*Rogers* v. *Alabama*, 192 U. S. 226 at p. 231, opinion by Holmes, *J.*). We have found no case in which this court has heretofore attempted to define the scope of the rule that a judgment of a sister state granting the plaintiff a divorce from a spouse not domiciled in that state nor appearing in the action nor personally served with process there imports that the court had acquired jurisdiction to render a valid judgment *in rem* changing the status of the plaintiff. In many decisions the court has, however, assumed the existence of a presumption, in the absence of evidence to the contrary, that the court had jurisdiction to render judgment, though, doubtless, the validity of the

judgment may be impeached by extrinsic evidence. (See *Kerr* v. *Kerr*, 41 N. Y. 272, 275; *Cross* v. *Cross*, 108 N. Y. 628, 630; *Matter of Kimball*, 155 N. Y. 62, 68.) Instinct in these and other decisions of this court is the rule that the foreign judgment of divorce will be given full force and effect as a judgment *in rem* dissolving the marriage of the plaintiff until impeached by evidence which establishes that the court had no jurisdiction over the *res*.[3] That rule is in accord with the great weight of judicial authority in this country. (See *Barnes* v. *Barnes*, 172 La. 648; *Howey* v. *Howey*, 240 S. W. 450, [Mo.] cert. denied, 260 U. S. 730; *Harrington* v. *Harrington*, 233 Mo. App. 390; *Commonwealth ex rel. Cronhardt* v. *Cronhardt*, 127 Pa. Super. 501, on re-[fol. 101] hearing, 135 Pa. Super. 117; *Goodloe* v. *Hauck*, 113 F. 2d 753, 755, 756, App. D. C.; *Dry* v. *Rice*, 147 Va. 331, 338; *McFarland* v. *McFarland*, 179 Va. 418, 428.) A different rule has been applied in Massachusetts and perhaps some other jurisdictions, to foreign decrees of divorce. (See *Commonwealth* v. *Blood* (97 Mass. 538); *Kelley* v. *Kelley* (161 Mass. 111); but cf. *Peaslee* v. *Peaslee* (147 Mass. 171, 180); *Corkum* v. *Clark* (263 Mass. 378, 382); but academic authority as well as the weight of judicial authority is opposed to the exclusion of foreign judgments of divorce from the benefit of the presumption of validity generally accorded to judgments of courts of general jurisdiction (3 Freeman on Judgments, § 1426; 2 Black on Judgments, §924; 2 Bishop, New Commentaries on Marriage, Divorce and Separation, §1526). The courts of this state have not refused to apply to judgments of divorce that general presumption."

So, in the instant case, appellee has failed to adduce any affirmative proof that appellant was not domiciled in the State of Nevada at the time he instituted his action there, and therefore this Court is bound to give full faith and credit to the Nevada decree. I would reverse the judgment of the Superior Court and revoke the order of support of the County Court of Allegheny County of December 8, 1942.

Mr. Chief Justice Maxey joins in this dissent.

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 20

ORDER ALLOWING CERTIORARI—Filed June 12, 1944

The order of March 6, 1944, denying certiorari in this case is vacated and the petition for writ of certiorari herein to the Supreme Court of the Commonwealth of Pennsylvania is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.